LIBRARY
SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73 46

VIRGINIA ELECTRIC AND POWER COMPANY,
A CORPORATION, *Petitioner,*
v.
CHARLES H. HADEN, II, TAX COMMISSIONER, ETC.
REVIVED IN THE NAME OF RICHARD L. DAILEY,
TAX COMMISSIONER, ETC., *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

H. BRICE GRAVES
JAMES PAUL GEARY
THOMAS N. CHAMBERS
Attorneys for Petitioner

OF COUNSEL:
HUNTON, WILLIAMS, GAY & GIBSON
P. O. Box 1535
Richmond, Virginia 23212
GEARY AND GEARY
5 Main Street
Petersburg, West Virginia 26847
JACKSON, KELLY, HOLT & O'FARRELL
P. O. Box 553
Charleston, West Virginia 25322

JARRETT PRINTING COMPANY, CHARLESTON, W. VA.

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	3
STATEMENT OF THE CASE	3
PROCEEDINGS BEFORE THE STATE TAX COMMISSIONER	4
PROCEEDINGS IN THE CIRCUIT COURT OF GRANT COUNTY, WEST VIRGINIA	5
PROCEEDINGS IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA	7
REASONS FOR GRANTING THE WRIT	10
1. Denial of due process of law in tax appeals	10
a. The decision is not in accord with the applicable decisions of this Court and denies petitioner due process of law	10
b. The importance of the decision	15
c. The importance of the decision as a bar to providing an adequate system of corrective justice	16
2. As to the substantive tax issue	19
CONCLUSION	24

Page

APPENDIX A—Opinion of the Supreme Court of Appeals 1a-21a

APPENDIX B—Order of the Supreme Court of Appeals 22a

APPENDIX C—Judgment Order of the Circuit Court of Grant County, West Virginia 23a-26a

APPENDIX D—Decision of the Tax Commissioner of the State of West Virginia 27a-33a

APPENDIX E—Petitioner's Motion for Rehearing 34a-37a

APPENDIX F—Constitutional Provisions and Statutes Involved 38a-46a

AUTHORITIES CITED

Cases: Page

Adams, J. D., Mfg. Co. v. Storen, 304 U. S. 307 (1938) 21

American Mfg. Co. v. St. Louis, 250 U. S. 459 (1919) 20

Anderson National Bank v. Luckett, 321 U. S. 233, 246-247 (1944) 13

Cheatham v. Norvekl, 92 U. S. 85 (1876) 13

Crowell v. Benson, 285 U. S. 22, 57 (1932) 14

Dailey v. Rollins, 200 S.E.2d 90 13

Evco v. Jones, 409 U. S. 91 (1972) 21

Freeman v. Hewit, 329 U. S. 249 (1948) 21

Goldberg v. Kelly, 397 U. S. 254 (1970) 10, 11

Halliburton Oil Well Co. v. Reily, 373 U. S. 64, 70 (1963) 23

Page

Hamill v. Koontz, 134 W. Va. 439, 59 S.E. 2d 879 (1950) 19

Hope Natural Gas Co. v. Hall, 274 U. S. 284 (1927) 21

M'Culloch v. Maryland, 4 Wheat. 316, 431 (1819) 15

Morrissey v. Brewer, 408 U. S. 471 (1972) 10, 11

Murchison, In Re, 349 U. S. 133, 136-137 ..... 10, 12

Offutt v. United States, 348 U. S. 11 (1954) 11, 12

Old Colony Trust Co. v. Commissioner, 279 U. S. 716 (1929) 18

People v. Naimark, 154 App. Div., 760, 137 NYS 418 (1913) 12

Phillips v. Commissioner, 283 U. S. 589, 596-597 (1931) 13

South Carolina Power Co. v. South Carolina Tax Comm., 52 F.2d 515 (D.C., S.C., 1931) 23

Utah Power & Light Co. v. Pfost, 286 U. S. 165 (1932) 8, 20, 21, 23

Ward v. Monroeville, 409 U. S. 57, 34 L.Ed. 2d 267 (1972) 10, 11

W. Va. State Bar v. Earley, 144 W. Va. 504, 109 S.E.2d 420 (1959) 16

Wong Yang Sung v. McGrath, 339 U. S. 33 (1950) 11, 12

Constitutional and Statutory Material:

United States Constitution

Fifth Amendment 2, 3, 15

Fourteenth Amendment 2, 3, 11, 15, 17

Article I, Section 8 ..... 2, 3

Page

West Virginia Constitution

Article V, Section 1 ..... 3, 17

Article 8, Section 5 8

United States Code

5 U.S.C. §554(a)(e) 17

28 U.S.C. §1257(3) 2

West Virginia Code:

11-1-2 12

11-1-2a 19

11-13-2 ..... 3, 21

11-13-2a 19, 21

11-13-2b 3, 4, 5, 7, 22

11-13-2d 3, 4, 8, 21, 22

11-13-7 ..... 3, 13

11-13-7b 3, 13

11-13-8 ..... 3, 5, 6, 8, 13, 14

29A-5-5 14

Other Authorities:

Philipps, "VEPCO—The Need for a Revised Tax Appeals Procedure in West Virginia," 76 W. Va. L. Rev. 1 (1974) 15, 19

Journal of West Virginia State Senate (1964), page 423 17

Page

Chambers and Southworth, "West Virginia Tax Law —Hearing and Appeal Procedures," 74 W. Va. L. Rev. 135, 139, 144 (1971-1972) 16

4 Davis, Administrative Law Treatise §29.10 (1958) 17

Davis, "Judicial Review of Administrative Action in West Virginia—A Study in Separation of Powers," 44 W. Va. L. Q. 270, 292 (1938) 18

Note, 58 W. Va. L. Rev. 274 (1956) 8

Note, 61 W. Va. L. Rev. 306, 308 (1959) 19

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No.

VIRGINIA ELECTRIC AND POWER COMPANY,
A CORPORATION, *Petitioner,*

v.

CHARLES H. HADEN, II, TAX COMMISSIONER, ETC.
REVIVED IN THE NAME OF RICHARD L. DAILEY,
TAX COMMISSIONER, ETC., *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

The petitioner prays that a writ of certiorari issue to review the decision of the Supreme Court of Appeals of West Virginia entered in the above cause.

OPINIONS BELOW

The opinion of the Supreme Court of Appeals is not officially reported at this time. It is unofficially reported at 200 S.E.2d 848, and is reprinted herein as Appendix A, pp. 1a-21a, *infra*. The order of the Supreme Court of Appeals denying petitioner's motion for rehearing is reprinted herein as Appendix B, p. 22a, *infra*. The Judgment Order of the Circuit Court of Grant County, West Virginia, is unreported and is reprinted herein as Ap-

pendix C, pp. 23a-26a, *infra*. The decision of the Tax Commissioner of the State of West Virginia which was appealed to the Circuit Court of Grant County likewise is unreported and is reprinted herein as Appendix D, 27a-33a, *infra*.

JURISDICTION

The decision of the Supreme Court of West Virginia was filed July 24, 1973. Appendix A, p. 1a, *infra*. Petitioner's motion for rehearing, a copy of which is reprinted herein as Appendix E, pp. 34a-37a, *infra*, was denied December 17, 1973. Jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

This case involves procedural and substantive aspects of the West Virginia business and occupation tax, the State's principal business tax, and presents two separate and distinct questions for review.

1. Does an informal administrative hearing conducted by the State Tax Commissioner or an examiner designated by him with respect to a tax assessment made by him deny petitioner due process of law, guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States, when only a judicial review upon the record received from the Tax Commissioner is afforded a taxpayer aggrieved by his ruling?

2. Does taxation of a public utility upon the privilege of manufacturing electric power violate the commerce clause, Article I, Section 8 of the Constitution of the United States, when such separate privilege tax is construed to apply only to that portion of a utility's domestic power generation which is transmitted and sold outside of the taxing state?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions involved herein are Article I, Section 8, Clause 3 of the Constitution of the United States, the Fifth and Fourteenth Amendments thereto and Article V, Section 1 of the Constitution of West Virginia. The statutes involved are certain sections of Chapter 11, Article 13 of the Code of West Virginia of 1931, as amended, and in particular sections 2, 2b, 2d, 7, 7b and 8. The foregoing constitutional provisions and statutes are reprinted as Appendix F, pp. 38a-46a, *infra*.

STATEMENT OF THE CASE

Virginia Electric and Power Company, the petitioner herein, is a public utility which provides electric power to the public in parts of Virginia, West Virginia and North Carolina. Its service area in West Virginia consists of part or all of the five counties of Greenbrier, Monroe, Pocahontas, Raleigh and Summers (R. 51-53).[1]

Upon application of petitioner, the West Virginia Public Service Commission, by order entered March 23, 1961, granted to it a certificate of public convenience and necessity to construct, maintain and operate a steam electric generating station on Stony River in Grant County, West Virginia. This generating station was completed and the petitioner began its operation in 1965. (R. 53)

During 1965 and 1966, this station, known as petitioner's Mount Storm plant, generated power in excess of power consumed by petitioner's West Virginia customers. The Mount Storm plant was petitioner's only

[1] Record references are to the separately bound record appendix filed in the Supreme Court of Appeals of West Virginia, and will be designated as "R. ____."

facility generating electricity in West Virginia during these years. For more than ten years prior to construction of its Mount Storm plant, the petitioner did not operate any generating plant in West Virginia. (R. 53)

For the years 1965 and 1966, petitioner filed returns and paid business and occupation taxes in the category of "electric light and power companies" pursuant to West Virginia Code 11-13-2d (Appendix F, *infra.*, p. 43a-44a). The measure of the tax stated in the statute for the exercise of this public utility privilege is sales and demand charges. It is agreed that petitioner correctly reported its income as required by this classification. (R. 52)

PROCEEDINGS BEFORE THE STATE TAX COMMISSIONER

On August 8, 1967, then State Tax Commissioner, G. Thomas Battle, made an assessment of business and occupation taxes and penalties against petitioner aggregating $329,743.47, the principal adjustment being to tax the petitioner in the category or classification of a manufacturer of electric power as to power generated at Mount Storm but distributed and sold outside West Virginia, pursuant to West Virginia Code 11-13-2b, Appendix F, *infra.*, p. 41a-43a.

Petitioner filed with the Tax Commissioner its petition and objections to said assessment, designated by statute as a "Petition for Reassessment." A hearing was held before G. Thomas Battle, State Tax Commissioner, on November 1, 1967, and thereafter by ruling dated May 5, 1969, the then State Tax Commissioner, Charles H. Haden, II,[2] successor to G. Thomas Battle, issued his de-

[2]State Tax Commissioner, Charles H. Haden, II, subsequently became a Justice of the Supreme Court of Appeals of West Virginia. Deeming himself disqualified, he did not participate in the consideration or decision of this case in the Supreme Court of Appeals.

cision, ruling that petitioner was indebted to the State of West Virginia for business and occupation tax in the amount of $159,143.32 and penalties in the amount of $33,903.64, or a total liability of $193,046.06. (R. 30-38)

The State Tax Commissioner in his decision of May 5, 1969, determined that petitioner was taxable under West Virginia Code 11-13-2b, Appendix F, *infra.*, pp. 41a-43a as a manufacturer of electric power as to the power generated at Mount Storm which was distributed and sold outside of West Virginia. (R. 54) The Tax Commissioner determined the value of the electric power to be 8.856 mills per kilowatt hour in 1965, and 8.512 mills per kilowatt hour in 1966. (R. 36) Penalties were imposed for failing to correctly return the tax on that basis. (R. 38)

PROCEEDINGS IN THE CIRCUIT COURT OF GRANT COUNTY, WEST VIRGINIA

On June 2, 1969, petitioner appealed the administrative decision of the State Tax Commissioner to the Circuit Court of Grant County, West Virginia (R. 1-8), pursuant to the provisions of West Virginia Code 11-13-8, Appendix F, *infra.*, pp. 45a-46a.

In its notice of appeal, petitioner alleged, among other things, that it had been denied administrative due process of law because the State Tax Commissioner relied upon certain third party evidence to determine the value of electric power manufactured which evidence was not introduced at the administrative hearing held November 1, 1967, and as to which the petitioner was denied, administratively, an opportunity to be heard. (Notice of appeal, par. 3(j), R. 6-7)

Noting the contents of the pleading, the Tax Commissioner attempted to withdraw his decision for the purpose of conducting a further hearing limited to the question

of value, acknowledging that the allegation in the pleading was correct. (R. 14-16) Thereafter, he filed in the Circuit Court a motion styled "Plea in Abatement and Motion to Dismiss and Remand" (R. 10-24). The motion was opposed upon the ground that a party litigant cannot oust a court of jurisdiction once acquired, and further because to allow the Tax Commissioner to reach a final decision and then, upon reading the taxpayer's appeal, partially recall his decision and make adjustments according to the taxpayer's allegations, and then return his assessment decision to the Circuit Court as *prima facie* evidence of the tax due and gain thereby an advanced administrative defeat of the taxpayer's position, would run afoul of basic fundamental due process guarantees of the Constitution. Further, it was taxpayer's position that the Circuit Court was to "determine anew all questions submitted to it". See Motion to Strike, etc., R. 25-29, and W. Va. Code 11-13-8, Appendix F, *infra.*, pp. 45a-46a.

The Circuit Court denied the Tax Commissioner's motion, finding that it had jurisdiction and that it had no statutory authority to remand the case, and designated a date for hearing. See order entered December 31, 1969 (R. 43-46). After a delay during which the Tax Commissioner unsuccessfully sought a writ of prohibition from the Supreme Court of Appeals of West Virginia with respect to the denial of his Plea in Abatement, etc., the Circuit Court set the case for hearing, limited to certain issues, to-wit: whether petitioner was taxable as a manufacturer of electric power and whether it was taxable as a producer of stone. (R. 49-50) A stipulation of facts was entered into by the parties, limited to the issues of taxability, the issues of value being reserved by the stipulation for later proof and argument if necessary. (R. 51-58)

In its Judgment Order the Circuit Court held, in pertinent part, as follows (Appendix C, *infra.*, pp. 23a-24a):

> "At the conclusion of the argument, the Court announced its findings and conclusions with respect to the issues presented; namely, that Plaintiff was not a manufacturer of electric power taxable under Code 11-13-2b and was not taxable as a producer of stone under Code 11-13-2a; the Court being of the opinion that with respect to the manufacturing issue that the statutes, and in particular, Section 2b and 2d, considered as a whole, are clear and unambiguous; that Plaintiff, an electric public utility, is not taxable under Section 2b but is taxable under Section 2d with respect to the conduct of its electric power business measured by sales and demand charges; that the sale of electric power produced by Plaintiff's facility at Mt. Storm and sold outside of this State is a transaction in interstate commerce and the gross income derived therefrom is specifically exempt from the measure of the tax by the express language of Section 2d; furthermore, the Court is of the opinion that such power sold without this State cannot constitutionally be taxed;"

PROCEEDINGS IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

The Supreme Court of Appeals reversed the holding of the Circuit Court of Grant County that petitioner was not taxable as a manufacturer of electric power and remanded the case for a determination of taxable value.

In so doing, the Court held that a public utility engaged in the manufacture of electric power is subject to the payment of the tax prescribed in Code 11-13-2b upon the value of all electric power so manufactured and transmitted outside of the State, as well as taxable upon

the exercise of the privilege of engaging in a public utility business under Code 11-13-2d. See opinion, Syllabus Points 1 and 2, Appendix A, *infra.*, p. 1a.[3] The Court dismissed taxpayer's contention, that the imposition of a tax upon the manufacture of power transmitted outside of the State constituted an unlawful burden on interstate commerce, upon the ground that the manufacture of electricity is a local activity and that commerce does not begin until the manufacture is finished, citing this Court's opinion in *Utah Power & Light Co. v. Pfost*, 286 U. S. 165 (1932). See Appendix A, *infra.*, p. 14a.

Moreover, after stating that it realized that the Circuit Court had not reached the issue of values, the Appellate Court proceeded to take cognizance of the Tax Commissioner's attempt to withdraw his administrative decision below, stating that "the court in its inherent powers has the authority in the circumstances described to remand the case to the Tax Commissioner for the taking of further evidence". See Appendix A, *infra.*, p. 9a.

The statute authorizing appeal of the Tax Commissioner's determination to the state circuit court, West Virginia Code 11-13-8, Appendix F, *infra.*, p. 46a, provides that:

> "The [Circuit] Court shall hear the appeal and determine anew all questions submitted to it on appeal from the determination of the Tax Commissioner."

The Supreme Court of Appeals said that the Circuit Court could not take evidence in appeals from decisions of the Tax Commissioner but is limited to reviewing the record of the hearing before the Tax Commissioner. The Court concluded:

---

[3]The Constitution of West Virginia, Article 8, Section 5, requires the Court to prepare syllabus points. Cf., Note 58 W. Va. L. Rev. 274 (1956).

> "To allow the Circuit Court to determine an issue on evidence not considered at the administrative hearing would cast the Court in the role of performing an executive function. Under the acknowledged principle of separation of powers this cannot be permitted. Thus, the Circuit Court must decide the case on the evidence in the record as it was received or it must return the case to the Tax Commissioner for the further presentation of evidence on values."

See Appendix A, *infra.*, p. 9a.[4]

Thereafter, petitioner filed a Petition for Rehearing with the Supreme Court of Appeals. In its Petition for Rehearing the petitioner stated that the Court's holding that a circuit court must decide the case on the evidence in the record as it was received from the Tax Commissioner will leave taxpayers without those fundamental due process and other procedural safeguards necessary to the fair administration of justice and will permit an adversary party to adjudicate a disputed claim in violation of the ancient precept that no man shall be the judge of his own cause. Petition for Rehearing, Appendix E, *infra.*, p. 36a.

Leave was granted to the West Virginia Society of Certified Public Accountants and the West Virginia Public Accountants' Association to file a joint brief *amici curiae* in support of the Petition for Rehearing directed solely to the procedural issue concerning the nature of the tax hearing and appeal.

The Petition for Rehearing was denied December 17,

---

[4]No administrative record was filed in the Circuit Court other than the Tax Commissioner's administrative decision, and to the knowledge of counsel, none exists. The administrative hearing was not recorded. The evidence before the Supreme Court of Appeals was stipulated by the parties in the Circuit Court of Grant County. See R. 51-58.

1973, (Justice Neely would grant as to the procedural issue).

REASONS FOR GRANTING THE WRIT

1. Denial of due process of law in tax appeals

The decision below on this issue merits a review by this Honorable Court because:

(a) It is not in accord with the applicable decisions of this Court, and denies petitioner due process of law;

(b) It involves a matter of importance not only to your petitioner but, also, to all taxpayers of the State of West Virginia, and

(c) If the decision below is allowed to stand, a *de novo* judicial trial in state tax cases is placed beyond the power of the State Legislature to grant.

a. The decision is not in accord with the applicable decisions of this Court and denies petitioner due process of law

The Court below held that a hearing upon appeal of the administrative decision of the State Tax Commissioner is limited to a judicial review upon the record. As a result, the administrative hearing held by the Tax Commissioner becomes the trial, the place where the evidence is introduced, and the dual role of the State Tax Commissioner, as an adversary party and as the hearing officer, denies petitioner due process of law.

The decision is in conflict with many recent decisions of this Honorable Court, including *Goldberg* v. *Kelly*, 397 U. S. 254 (1970); *Morrissey* v. *Brewer*, 408 U. S. 471 (1972); and *Ward* v. *Monroeville*, 409 U. S. 57, 34 L.Ed. 2d 267 (1972). See also *In Re Murchison*, 349 U. S.

133 (1955); *Wong Yang Sung* v. *McGrath*, 339 U. S. 33 (1950); and *Offutt* v. *United States*, 348 U. S. 11 (1954).

The proposition advanced, we believe, is well established and applies to administrative agencies as well as to the courts.

Thus, in *Goldberg* v. *Kelly, supra*, 397 U. S. at 270-271, this Court held that procedural due process under the Fourteenth Amendment required that welfare recipients be afforded an evidentiary hearing before termination of benefits by state welfare authorities. It was said that the hearing need not take the form of a trial but that it must meet minimum procedural safeguards demanded by rudimentary due process of law which includes affording the welfare recipient the opportunity to confront and cross-examine witnesses, to retain counsel, and to present evidence to an impartial decision maker, who should state the reasons for his determination and indicate the evidence upon which he relies. Of particular significance to this appeal is the holding that—

> ". . . of course, an impartial decision maker is essential." (397 U. S. at 271)

In *Morrissey* v. *Brewer*, 408 U. S. 471, 489 (1972), this Court said that the minimum requirements of due process "include . . . a 'neutral and detached' hearing body."

In *Ward* v. *Monroeville*, 409 U. S. 57, 34 L.Ed. 2d 267, (1972), this Court held that a town mayor was disqualified from conducting a trial upon a minor traffic offense charge because the duties of his office included responsibilities for village finances. Otherwise, the result would be one official occupying two practically and seriously inconsistent positions, one partisan and the other judicial, and necessarily involving a lack of due process of law. 34 L.Ed. 2d at 271.

In the case of *In Re Murchison*, 349 U. S. 133, 136-137, (1955) this Court said that no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. Wholly apart from matters of personal bias this Court stated that "Fair trials are too important a part of our free society to let prosecuting judges be trial judges of the charges they prefer." And, finally, in *Offutt* v. *United States*, 348 U. S. 11, 14 (1954) it was said that "justice must satisfy the appearance of justice."

These principles are well stated in the case of *People* v. *Naimark*, 154 App. Div., 760, 139 NYS 418 (1913). The New York Court said (139 NYS at 420):

> "The first idea, in the administration of justice . . . is that a judge must necessarily be free from all bias and partiality. He cannot be both judge and party, arbiter and advocate in the same cause. Mankind are so agreed in this principle that any departure from it shocks their common sense and sentiment of justice."

Such thoughts as these gave rise to the federal Administrative Procedures Act. See *Wong Yang Sung* v. *McGrath*, 339 U. S. 33, 41-45 (1950).

The dual role of the State Tax Commissioner in the instant controversy is obvious. It stands revealed in the very caption of the case: Virginia Electric and Power Company versus State Tax Commissioner.

It is the duty of the West Virginia State Tax Commissioner to see that the laws concerning the assessment and collection of all taxes and levies are faithfully enforced. W. Va. Code 11-1-2. The pertinent provisions of the State business and occupation tax law are contained in Appendix F. To summarize them, the Tax

Commissioner is charged with the duty to investigate and determine or estimate the tax liability of a taxpayer and to make assessment therefor. The administrative hearing is conducted by him or by a hearing examiner designated by him, and after the hearing the Tax Commissioner renders his decision which the taxpayer may appeal to the Circuit Court. See W. Va. Code, Ch. 11, Art. 13, Sections 7, 7b and 8, Appendix F, *infra*.

The Tax Commissioner's duties as the tax collector for the State are inherently in conflict with the adjudicatory function involved in passing upon the correctness of a tax assessment made by him.

This Court observed long ago in *Cheatham* v. *Norvekl*, 92 U. S. 85 (1876), that "all governments, in all times, have found it necessary to adopt stringent measures for the collection of taxes, and to be rigid in the enforcement of them." Such measures have generally been upheld provided the government extends to its citizens an adequate system of corrective justice.

The West Virginia system, as judicially construed, is plainly inadequate. Moreover, it cannot be said that the defects of this patently unfair administrative adjudicatory process are cured by subsequent judicial review of the tax administrator's decision (made on the administrative record). Compare, *Phillips* v. *Commissioner*, 283 U. S. 589, 596-597 (1931) and *Anderson National Bank* v. *Luckett*, 321 U. S. 233, 246-247 (1944).

The cited cases, *Phillips* v. *Commissioner*, *supra*, and *Anderson National Bank* v. *Luckett*, *supra*, stand for the proposition that where only property rights are involved, mere postponement of judicial inquiry is not a denial of due process if the opportunity given for the ultimate

judicial determination of liability is adequate and suitable for the occasion.

A judicial review on the record of what must be, for reasons heretofore stated, an inherently unfair administrative hearing cannot be an adequate remedy suitable to the occasion.

In addition to the inherent conflict in the Tax Commissioner's dual role as an adversary and judge, the administrative hearing is defective in other particulars. It must be conducted in haste; the notice of appeal must be filed within 30 days of assessment and hearing held within 60 days, absent continuance. The hearing is "informal" and the provisions of the state Administrative Procedures Act which govern contested cases are expressly inapplicable to the Tax Department proceeding. See W. Va. Code, 29A-5-5.

In this posture, a mere judicial review on the record made before the administrator must necessarily be inadequate. While the scope of review was not articulated in the opinion below, the appeal statute, W. Va. Code 11-13-8, provides that "a certified copy of the tax commissioner's assessment shall be admissible and shall constitute *prima facie evidence* of the tax due." In his brief below, at page 59, the Tax Commissioner argued that court review was limited to whether the administrative decision is "supported by substantial evidence" or is "palpably wrong."

Whatever the scope of review, under the decision below the administrator has become the trier of the fact and, as the late Chief Justice Hughes observed, not infrequently "finality as to facts becomes in effect finality in law." *Crowell* v. *Benson*, 285 U. S. 22, 57 (1932). Judicial review on the record cannot cure a denial of

due process in the administrative hearing arising from the hearing officer's dual function of adversary and judge.

Upon the remand of this case, the Tax Commissioner can and presumably will correct the procedural error occurring upon the first administrative hearing. However, his position as adversary prevents him from fairly occupying the role of the trier of the fact as to the issue remanded, valuation. Under the circumstances petitioner must be allowed a trial of the issue in the circuit court.

The Fifth Amendment, made applicable to the States by the Fourteenth Amendment, provides that no person shall be deprived of life, liberty or property, without due process of law. While several decisions of this Honorable Court, cited by petitioner, may be said to involve matters of life or liberty, property rights arising from a struggle between a citizen and his government over matters of taxation are no less vital. "The power to tax," said Chief Justice Marshall in *M'Culloch* v. *Maryland*, 4 Wheat. 316, 431 (1819), "involves the power to destroy."

Petitioner has been denied due process of law.

b. The importance of the decision

The instant decision as it relates to tax appeal procedures involves all taxpayers subject to business tax assessments. This importance was assigned as a ground for the requested rehearing in the Court below. The importance of the decision to them is aptly summarized by West Virginia University Law Professor J. Timothy Philipps, in an article commenting on the instant decision[5] as follows:

> "The situation, as a result of *VEPCO*, is one in which the taxpayer's only opportunity for a full

[5] "VEPCO—The Need for a Revised Tax Appeals Procedure in West Virginia," 76 W.Va. L Rev. 1 at page 9 (1974).

> hearing is before an office whose interests inherently conflict with the function of deciding his case impartially. Before the courts he is limited to a hearing on the record made before the Tax Commissioner, with the court presumably applying the exacting traditional standard of upholding the administrative decision unless it is clearly erroneous or not supported by substantial evidence. The Tax Commissioner has in effect, become the tax judge as well as the tax collector. Clearly, as the situation stands, West Virginia taxpayers are left with an inadequate appeal process."

The general importance of the decision is further evidenced by the action of the West Virginia Society of Certified Public Accountants and the West Virginia Public Accountants Association in filing a joint brief *amici curiae* in support of taxpayer's petition for rehearing on this issue in the Court below for the decision would seemingly make appearances before the administrative agency the practice of law. Cf., *W. Va. State Bar* v. *Earley*, 144 W. Va. 504, 109 S.E. 2d 420 (1959).

c. The importance of the decision as a bar to providing an adequate system of corrective justice.

The administrative process discussed above may have been adequate so long as the appeal procedure was interpreted to allow taxpayers aggrieved by the decision of the State Tax Commissioner to appeal his decision to the courts of the State and there to receive a new trial. This is what the process was thought to mean for many years.*

Federal agency hearings are exempt from compliance with the federal Administrative Procedures Act where

*See Chambers and Southworth, "West Virginia Tax Law—Hearing and Appeal Procedures," 74 W. Va. L. Rev. 135, 139, 144 (1971-1972). Mr. Chambers is one of counsel for petitioner in this case.

a matter is subject to subsequent trial of the law and facts, *de novo*, in a court. See 5 U.S.C. §554(a)(e). A like thought undoubtedly motivated the West Virginia Legislature when it exempted the Tax Commissioner from the contested case provisions of the state Administrative Procedures Act. See Journal of West Virginia State Senate (1964), page 423, when it was said that such exemption was granted inasmuch as the administrative and review procedures in tax cases "have been fully provided by law."

However, the West Virginia Supreme Court declared in this case that the grant of a new trial in tax cases would contravene the separation of powers provision of the State Constitution, Article V, Section 1. It said (Appendix A, *infra.*, p. 9a):

> "To allow the circuit court to determine an issue on evidence not considered at the administrative hearing would cast the court in the role of performing an executive function. Under the acknowledged principle of separation of powers this cannot be permitted. Thus, the circuit court must decide the case on the evidence in the record as it was received or it must return the case to the tax commission for the further presentation of evidence on values."

The precise "executive function" involved is not defined. Certainly, it cannot be that a court is lacking in qualification to make findings of fact from conflicting evidence. 4 Davis, *Administrative Law Treatise* §29.10 (1958). The restrictive view taken by the West Virginia Court of judicial review of administrative decisions led Professor Davis to suggest some years ago that "the separation of powers clause of the West Virginia Constitution so interpreted, violates the Fourteenth Amendment of the Constitution of the United States, as interpreted

by the Federal Supreme Court and is, therefore, unconstitutional." Davis, "Judicial Review of Administrative Action in West Virginia—A Study in Separation of Powers," 44 W. Va. L. Q. 270, 292 (1938).

In *Old Colony Trust Co.* v. *Commissioner*, 279 U. S. 716 (1929), Mr. Chief Justice Taft found a Federal tax case to be a case or controversy within the judicial article of the federal Constitution, although he stated, also, that it was not necessary that the proceeding to be judicial must be entirely *de novo*. He said (279 U. S. at 724):

> "In the case we have here, there are adverse parties. The United States or its authorized official asserts its right to the payment by a taxpayer of a tax due from him to the government, and the taxpayer is resisting that payment. . . . That makes a case or controversy and the proper disposition of it is the exercise of judicial power. . . . The subject matter of the controversy is the amount of the tax claimed to be due or refundable and its validity and the judgment to be rendered is a judicial judgment."

Nonetheless, the present posture of the case is such that it is a violation of the West Virginia Constitution to grant taxpayers a new trial upon appeal from assessments of the State Tax Commissioner.[7] This holding handicaps the State Legislature in finding an appropriate remedy by foreclosing enactment of new legislation which would clearly grant taxpayers a new trial in the courts of the State. Even creation of a State Tax Court as part of the judicial branch of government is seemingly foreclosed, leaving open only an administrative board of tax appeals

[7]Without referring to the instant decision then pending on petition for rehearing, the State Supreme Court upheld a statute granting the Tax Commissioner a new trial in the Circuit Court upon an appeal from a County Court decision setting the value of property for inheritance tax purposes. See *Dailey* v. *Rollins*, ____ W. Va. ____, 200 S. E.2d 90 (November 13, 1973).

established within the executive branch of government. See Philipps, "VEPCO—The Need for a Revised Tax Appeals Procedure in West Virginia," 76 W. Va. L. Rev. 1, 10 (1974).

The prepayment procedure invoked by your petitioner in this case is the only assured process by which a West Virginia taxpayer may ultimately place his tax liability at issue before the courts of the State.

A prior statute, giving taxpayers the right to bring refund suits, was held unconstitutional on sovereign immunity grounds. See *Hamill* v. *Koontz*, 134 W. Va. 439, 59 S.E.2d 879 (1950). West Virginia is one of only four states continuing an absolute constitutional bar to suits against the State. See Note, 61 W. Va. L. Rev. 306, 308 (1959). Under a present statute, W. Va. Code 11-1-2a, the Tax Commissioner may initiate declaratory judgment actions in refund cases, but only when he entertains "substantial doubt" as to the correctness of his administrative decision denying the refund sought, a subjective judgment frought with inherent conflict, as noted above.

For the foregoing reasons the petition for writ of certiorari should be granted as to this issue.

2. As to the substantive tax issue

By resting petitioner's taxability as a manufacturer of electric power upon the place of sale of such electricity, the decision below discriminates against and directly burdens interstate commerce, contrary to the holdings of this Court.

The Court below upheld the imposition of a manufacturing privilege tax upon only that portion of petitioner's power generation which was sold outside of the State.

It was stipulated that all of the power generated at Mount Storm was transmitted over transmission lines which connected with petitioner's transmission and distribution system in Virginia, which system serves a three state service area (R. 53). To arrive at the portion of the power taxable in the manufacturing category, the Tax Commissioner reduced the total kilowatt hours produced at Mount Storm by the kilowatt hours sold to petitioner's West Virginia utility customers. (R. 54) This determination was sustained by the Supreme Court of Appeals of West Virginia.

By its limitation of the manufacturing tax to outshipments of power, the express holding below belies the effort made in the body of that Court's opinion to rest the tax upon a purely local activity. In this time of energy shortage and crises, such holding requires careful scrutiny in the national interest.

Domestic generation of electric power has a local situs and the generation activity measured at the point of production without reference to the place of sale may be taxed. *Utah Power & Light Co.* v. *Pfost,* 286 U. S. 165 (1932). See also, *American Mfg. Co.* v. *St. Louis,* 250 U. S. 459 (1919).

However, the holding below does not tax petitioner in the manufacturing category on all of the electricity which it produced but only upon the portion thereof which was exported. This is the constitutional infirmity of the opinion below and this is the distinction that renders *Utah Power & Light Co.* v. *Pfost, supra,* inapplicable, as supportive of the State's position.

In *Utah Power & Light Co.* v. *Pfost, supra,* the Idaho tax applied to all of the power generated in that State,

not just to the portion transmitted and sold out of the state.[8] Moreover, this Court said (286 U. S. at 182):

> "So far as it produces electrical energy in Idaho, its business is purely intrastate, subject to state taxation and control. In transmitting the product across the state line into Utah, appellant is engaged in interstate commerce, and State legislation in respect thereof is subject to the paramount authority of the commerce clause of the Federal Constitution."

This Court has struck down gross receipts taxes like those here involved even though local manufacturing is involved, if the tax is measured by sales in interstate commerce or directly burdens such commerce, and the instant decision is in conflict therewith. See *J. D. Adams Mfg. Co.* v. *Storen*, 304 U. S. 307 (1938); *Freeman* v. *Hewit*, 329 U. S. 249 (1948). See also, *Hope Natural Gas Co.* v. *Hall*, 274 U. S. 284 (1927), and *Evco* v. *Jones*, 409 U. S. 91 (1972).

The West Virginia business and occupation tax (W. Va. Code, Ch. 11, Art. 13) is a privilege tax. Section 2 of Article 13, Appendix F, *infra.*, levies an annual privilege tax against persons on account of the various business conducted. These businesses or privileges are classified or defined and different rates of tax are provided in Sections two-a through two-j, inclusive.

Petitioner paid a tax under Section two-d (W. Va. Code, 11-13-2d, Appendix F, *infra.*, pp. 43a-44a) captioned "Public service or utility business." The conduct of an electric utility business includes in the normal course,

---

[8] A statutory exemption was provided under Idaho law for power used to pump water for irrigation purposes. This Court in *Utah Power & Light Co.* v. *Pfost*, 286 U. S. at 185-186, considered such limited exemption separately and held it valid as an appropriate matter of public concern in an arid region. In contrast, by taxing only power transmitted and sold outside the state, the instant case, in effect, involves an exemption for all domestic consumption.

the generation of power, the transmission of power and the distribution of power.

However, the taxing scheme selected by the West Virginia Legislature was to make sales and demand charges the sole yardstick or measure of the privilege tax upon electric utilities. Interstate sales are expressly excluded from this sales measure, as they must be, and no reduction or lesser rate of tax is provided because a utility does not generate its own power or because it imports it. See W. Va. Code 11-13-2d Appendix F, *infra.*, pp. 43a-44a.

By contrast, W. Va. Code 11-13-2b, which imposes a privilege tax upon the business of manufacturing, during the years at issue, applied only to the manufacture of:

> "electric power *not* produced by public utilities taxable under other provisions of this article." (Emphasis added)

Petitioner argued below that it was expressly excluded from the manufacturing tax since it was a public utility as to the Mount Storm plant and since it was taxable under another provision of Article 13, specifically subsection 2d. The Court below disregarded such statutory construction argument. Also, by its holding limiting the manufacturing tax to outshipments of power, the Court disregarded the further provision of W. Va. Code 11-13-2b, which states:

> "The measure of this tax is the value of the entire product manufactured, compounded or prepared in this State for sale, profit or commercial use, *regardless of the place of sale or the fact that deliveries may be made to points outside the State.*" (Emphasis added)

The Court below attempted to justify its holding on the ground that petitioner exercised multiple privileges

with respect to the generation of power at its Mount Storm generating station; a utility privilege as to power domestically consumed and a manufacturing privilege as to power shipped out of the state. Undoubtedly, the State would note, also, that the rate of tax imposed upon utilities under Section 2d, measured by sales and demand charges, is higher than that imposed upon manufacturers under Section 2b; hence, the State will deny discrimination against or burden upon interstate commerce.

Classification will not save a tax which is specifically visited upon interstate commerce. Even if it could, all validity to the classification argument disappears when it is realized that neither the presence nor absence of domestic power generation enters into the measure of the tax imposed under Section 2d. The utility tax is measured solely by sales and demand charges. Accordingly, such a classification analysis is both superficial and unsound.

A state may subdivide the utility privilege into its several components and separately tax power generation at the place of generation without reference to the place of ultimate sale, *Utah Power & Light Co.* v. *Pfost, supra,* and, also, tax the domestic distribution and sale of power. Cf., *South Carolina Power Co.* v. *South Carolina Tax Comm.*, 52 F.2d 515 (D.C., S.C., 1931).

It may not, we respectfully submit, impose a tax on the utility sale of power determined without reference to generation and, in addition, tax utility generation when, and only when, it results in an out-of-state sale. Compare *Halliburton Oil Well Co.* v. *Reily*, 373 U. S. 64, 70 (1963).

Petitioner was granted a certificate of public convenience and necessity by the State of West Virginia not

only to construct the Mount Storm generating station, but also to "operate" it. The State cannot deny petitioner's utility status. By imposing overlapping privilege taxes, the State has levied a tax directly upon and, to that extent, directly burdened and discriminated against interstate commerce.

The State may not visit on the petitioner an added manufacturing tax applicable only to the power which is transmitted out of the state for sale. The writ should be granted as to this issue.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted with respect to both issues presented and the judgment below reversed.

Respectfully submitted,

H. BRICE GRAVES
JAMES PAUL GEARY
THOMAS N. CHAMBERS

Attorneys for Petitioner

OF COUNSEL:

HUNTON, WILLIAMS, GAY & GIBSON
P. O. Box 1535
Richmond, Virginia 23212

GEARY AND GEARY
5 Main Street
Petersburg, West Virginia 26847

JACKSON, KELLY, HOLT & O'FARRELL
P. O. Box 553
Charleston, West Virginia 25322
February, 1974

APPENDICES

APPENDIX A

VIRGINIA ELECTRIC AND POWER COMPANY,
a corporation,

v.

CHARLES H. HADEN, II, Tax Commissioner, etc.
Revived in the Name of RICHARD L. DAILEY,
Tax Commissioner, etc.

Grant County

Affirmed in part;
reversed in part;
remanded for further
proceedings.

Caplan, Justice

1. A public utility may be taxed under more than one provision of the business and occupation tax statute if it appears from the record that it is engaged in more than one business activity, as catagorized in Code, 1931, 11-13-2a through 2j, as amended.

2. A public utility engaged in the manufacture of electric power is subject to the payment of the tax prescribed in Code, 1931, 11-13-2, as amended, at the rate provided in Section 2b thereof, upon the value of all electric power so manufactured and transmitted outside of the state.

3. Manufacturing is a local activity and the product manufactured cannot become a part of commerce until such manufacturing process is completed; therefore, a tax on the manufacture in this state of electric power, even though such power is subsequently transmitted to another state, does not constitute a tax on interstate commerce.

4. A casual or isolated use of a natural resource in one's business which does not require continuous production thereof does not cause one to be engaged in the business of producing for sale, profit or commercial use any natural resource products, as contemplated by Code, 1931, 11-13-2a, as amended.

Caplan, Justice:

This is an appeal by Richard L. Dailey, Tax Commissioner of the State of West Virginia, successor to Charles H. Haden, II, from a final order of the Circuit Court of Grant County, dated June 22, 1971. The proceeding before that court was an appeal by Virginia Electric and Power Company from an administrative decision of the then Tax Commissioner. In said order the court held that Virginia Electric and Power Company, herein sometimes called the Power Company, or taxpayer, was not a manufacturer of electric power taxable under Code, 1931, 11-13-2b, as amended, and further, that it was not taxable as a producer of natural resource products under Code, 1931, 11-13-2a, as amended. The Power Company was taxable, held the court, under Code, 1931, 11-13-2d, as amended, with respect to the conduct of its electric power business measured by sales and demand charges. Furthermore, the court held that the sale of electricity, manufactured at its Mount Storm plant, to customers outside the state constitutes a transaction in interstate commerce and cannot constitutionally be taxed.

Virginia Electric and Power Company is a Virginia corporation, qualified to do business in West Virginia and North Carolina. It is a public utility which provides electric power to the public in parts of West Virginia, Virginia and North Carolina. The area served by it in West Virginia consists of all or parts of the counties of Greenbrier, Monroe, Pocahontas, Raleigh and Summers.

Upon the application of the Power Company, the West Virginia Public Service Commission, by an order entered March 23, 1961, granted it a certificate of convenience and necessity to construct, maintain and operate a steam electric generating station on Stony River in Grant County, West Virginia, said station to be hereinafter referred to as the Mount Storm plant. This generating station was completed and the Power Company began its operations in 1965.

During the years 1965 and 1966 all of the electric power manufactured by the Power Company at Mount Storm was transmitted over transmission lines connecting with its transmission and distribution system in Virginia. This is the system that serves its utility customers in Virginia, West Virginia and North Carolina. The power sold to the West Virginia customers is returned to this state via its distribution system in Virginia.

In 1965 the Power Company sold 14.89% of the total electric power manufactured at Mount Storm to its West Virginia customers and the balance, 85.11%, to customers located outside the boundaries of this state. The sale of electricity by the appellee to customers outside the state were even greater in 1966. The record reveals that during that year, of the total production of the Mount Storm plant, 2.87% was sold to West Virginia customers and 97.13% went to outside customers.

In 1965 and 1966 the Power Company paid business and occupation tax on the gross amount derived from the electric power manufactured at Mount Storm and sold to its West Virginia customers, said tax having been paid at the rate prescribed in Code, 1931, 11-13-2d, as amended. Section 2d applied to public utilities engaged in the business of selling electricity within the state.

For the same years the taxpayer failed to report or pay tax under any section of Code, 1931, 11-13, as amended, upon the value of 85.11% and 97.13% of its Mount Storm production which was sold to consumers outside the state.

To facilitate its Mount Storm plant in the manufacture of electricity it became necessary to construct a cooling water reservoir. This was accomplished by impounding water of the Stony River with an earth and rock fill dam. In the construction of said dam, rock was quarried from the construction site of the power generating plant and incorporated into and made an integral part of said dam. The rock was quarried and transported to the dam site and incorporated therein by Garbart Construction Company, a subcontractor of George F. Hazelwood and Company, the main contractor for the construction of the Mount Storm Station. Thus, the Power Company caused the excavation and relocation of rock and stone upon its own property for use in the required dam. During the construction of this dam, which covered a period of two years, the appellee failed to report or pay any tax under Code, 1931, 11-13-2a upon the value of the stone quarried and produced upon its property and incorporated into said dam.

The Tax Commissioner, being of the opinion that the Power Company was subject to the payment of business and occupation tax under Code, 1931, 11-13-2b, as amended, and then in effect, as a manufacturer of electric power and under Code, 1931, 11-13-2a, as amended, and then in effect, as a producer of natural resource products, issued an assessment of business and occupation tax against said Power Company for the years 1962, 1963, 1964, 1965 and 1966. Thereafter, pursuant to Code, 1931, 11-13-7b, as amended, the appellee petitioned the Tax Commissioner for a reassessment of said tax and an ad-

ministrative hearing thereon was held by the commissioner on November 1, 1967.

Subsequent thereto, the Tax Commissioner issued his administrative decision wherein he held that the Power Company was a manufacturer of electric power within the meaning of Code, 1931, 11-13-2b, as amended, and as to that portion of electric power generated at Mount Storm not distributed in utility sales within this state, it was subject to business and occupation tax at the rate prescribed in said Section 2b. The Commissioner further held that, by reason of the aforesaid quarry operations, the Power Company was a producer of natural resource products, as contemplated by Code, 1931, 11-13-2a, as amended, and, as such, was subject to business and occupation tax at the rate prescribed in said Section 2a. His decision reduced the original assessment from $277,-922.40 to $159,143.32 and imposed a penalty on the latter sum in the amount of $33,903.64.

Virginia Electric and Power Company appealed this administrative decision to the Circuit Court of Grant County, alleging, *inter alia,* that the Tax Commissioner had relied upon certain third party evidence to determine the value of the electric power manufactured and the rock quarried. The values used by the Tax Commissioner in arriving at his decision were determined by the state tax auditors. Being of the opinion that the Power Company's objection to the state's evidence was valid, the Tax Commissioner sought to withdraw his administrative decision and afford a full hearing for the purpose of permitting said company to offer further evidence in determining the aforesaid values. With this purpose in mind the Tax Commissioner filed a Plea in Abatement and Motion to Dismiss and Remand. The Power Company followed by filing a "Motion to Strike that Certain Plead-

ing of the Defendant's Entitled 'Plea in Abatement and Motion to Dismiss and Remand' ".

The circuit court, by order entered December 31, 1969, denied the Tax Commissioner's Plea in Abatement and Motion to Dismiss and Remand, ruling that no order of the court was needed to perfect the appeal and that the purported withdrawal by the Tax Commissioner of his administrative decision did not oust the court of jurisdiction. Also, the court ruled that it did not have authority to remand the case to the Tax Commissioner for further administrative proceedings. After additional pleadings were filed and upon further consideration, the circuit court, on June 22, 1971, entered the order from which this appeal is prosecuted.

As is evident from the foregoing, the basic questions to be resolved on this appeal are: (1) Is Virginia Electric and Power Company a manufacturer of electricity under Code, 1931, 11-13-2b, as amended, and if so, can the tax at the rate prescribed in Section 2b be imposed on all electricity generated and sent out of the state via its transmission system in Virginia, or would such tax constitute a burden on interstate commerce? (2) Is Virginia Electric and Power Company a producer of natural resource products as contemplated by Code, 1931, 11-13-2a, as amended, and, as such, subject to the tax prescribed by that Code Section?

Additional questions, procedural in nature, have been raised. First, may the Tax Commissioner withdraw his administrative decision after an appeal therefrom has been perfected to a circuit court and thereby require the circuit court to remand the case to said commissioner for further proceedings; and, second, was the appeal properly filed in the circuit court? As to the second procedural

question, this appeal is statutory, it having been taken as provided in Code, 1931, 11-13-8, as amended. Wherein that statute is pertinent it provides "The appeal shall be taken by written notice to the tax commissioner and served as an original notice. When said notice is so served it shall, with the return thereon, be filed in the office of the clerk of the circuit court and docketed as other cases with the taxpayer as plaintiff and the tax commissioner as defendant." This appeal is afforded as a matter of right and "It is the general rule that every state may, within its constitutional authority, prescribe the manner in which its courts shall acquire jurisdiction * * * and where the mode of acquiring jurisdiction is prescribed by statute compliance therewith is essential or the proceedings will be a nullity * * *." 21 C.J.S., Courts, Section 80. We are in agreement with this rule and find that the Power Company, having complied with the requirements of the statute, properly filed its appeal in the Circuit Court of Grant County.

In relation to the first procedural question, the Tax Commissioner asserts that in the circumstances of this case he had a right to withdraw his administrative decision. Reiterating briefly these circumstances, the record reveals that the Tax Commissioner based his decision, as to values, only upon the evidence of the state tax auditors. When the Power Company complained that it was denied administrative due process of law in that it was not afforded an opportunity to offer evidence as to the value of the electric power generated and of the rock quarried for the dam, the Tax Commissioner sought to withdraw the subject administrative decision in an attempt to rectify this wrong. The taxpayer resisted the commissioner's motion and the court held that it had no authority to remand the case to the Tax Commissioner

for further consideration and refused the Tax Commissioner's request.

The present posture of this case makes the position taken by the Power Company incongruous. It complained of not having had the opportunity to offer evidence of values but when that opportunity was afforded, it resisted the motion which would permit it to avail itself of such opportunity. The only evidence of such values before the court was that offered by the Tax Commissioner. In view of the language of Code, 1931, 11-13-8, as amended, and of its interpretation by this Court in *Walter Butler Building Company* v. *Soto,* 142 W. Va. 616, 97 S.E.2d 275, the case must be decided as to values on the evidence before it. The following language of said statute is pertinent: "The court shall hear the appeal and determine anew all questions submitted to it on appeal from the determination of the tax commissioner."

Commenting on the part of Section 8 quoted immediately above, the Court, in *Walter Butler Building Company* v. *Soto, supra,* noted that the primary purpose of the Legislature in enacting such provision was to permit judicial review and determination of the validity of the tax commissioner's ruling and to afford the taxpayer a method of procedure whereby the correctness of such ruling could be presented and judicially determined. The Court then said: "* * * that provision of the section is construed to mean that the court on appeal is empowered to hear and determine only judicial questions which result from the determination of the State Tax Commissioner and that the court is not empowered to hear and determine administrative or other nonjudicial questions." See also *Sims* v. *Fisher,* 125 W. Va. 512, 25 S.E.2d 216; *Danielley* v. *The City of Princeton,* 113 W. Va. 252, 167

S.E. 620; and *Hodges* v. *Public Service Commission,* 110 W. Va. 649, 159 S.E. 834.

We deduce from the above-quoted language and from the cited authorities that a hearing and determination anew, as provided in said Section 8, means that the circuit court shall make a judicial determination of the correctness of the administrative decision, but that it does not permit such court to receive new evidence in making a determination of the issue. To allow the circuit court to determine an issue on evidence not considered at the administrative hearing would cast the court in the role of performing an executive function. Under the acknowledged principle of separation of powers this cannot be permitted. Thus, the circuit court must decide the case on the evidence in the record as it was received or it must return the case to the Tax Commissioner for the further presentation of evidence on values.

We realize that due to the holding of the circuit court the issue of values was not reached in that proceeding. However, should this Court reverse the judgment of the circuit court a determination of the value of the electricity generated at the Mount Storm plant and of the rock used in the dam would have to be made upon remand.

While we are not cognizant of any principle of law or authority which would permit the Tax Commissioner, as a matter of law, to withdraw his administrative decision and thereby oust the circuit court of its jurisdiction, we are of the opinion and so hold that the court in its inherent powers has the authority in the circumstances described above to remand the case to the Tax Commissioner for the taking of further evidence. As expressed in 20 Am. Jur. 2d, Courts, Sections 78 and 79, courts have inherent power to do all things that are reasonably

necessary for the administration of justice within the scope of their jurisdiction. In the instant case justice dictates that the taxpayer be afforded an opportunity to offer its evidence as to values and that the court be empowered, if the circumstances warrant, to remand the case so that this opportunity may be afforded.

Bringing into focus the issues on the merits of the instant case, is the order of the circuit court dated October 3, 1970 which defined such issues as follows: "* * * whether the plaintiff is taxable as a manufacturer of electric power under Section 2b, Article 13, Chapter 11 of the Code of West Virginia, and whether the plaintiff is taxable as a producer of stone within the meaning of Section 2a, Article 13, Chapter 11 of said Code." As heretofore noted, the court held that the power company was not subject to the tax prescribed in either of the aforementioned statutes.

The statute in issue in relation to the manufacture of electricity, Code, 1931, 11-13-2b, as amended, provides:

> "Upon every person engaging or continuing within this State in the business of manufacturing, compounding or preparing for sale, profit, or commercial use, either directly or through the activity of others in whole or part, any * * * or electric power not produced by public utilities taxable under other provisions of this article, the amount of the tax to be equal to the value of the article, * * * or electric power manufactured, compounded or prepared for sale, as shown by the gross proceeds derived from the sale thereof by the manufacturer or person compounding or preparing the same, except * * *. The measure of this tax is the value of the entire product manufactured, compounded or prepared in this State for sale, profit or commercial use, regardless of the place

of sale or the fact that deliveries may be made to points outside the State * * *."

It is the position of the taxpayer that under the language of the above-quoted statute "electric power not produced by public utilities taxable under other provisions of this article" it is excluded from such taxation. It asserts that as it is taxed under Section 2d of the said chapter and article as a public utility, it cannot be taxed under Section 2b as a manufacturer of electric power. The taxpayer further asserts that the business and occupation tax is by statute a tax levied for the privilege of engaging in business in West Virginia and that the privilege exercised by it is that of a public utility business, taxable only under said Section 2d.

It is the position of the Tax Commissioner that Virginia Electric and Power Company, for the years in issue, was properly taxed under Code, 1931, 11-13-2d, as amended, upon that portion of electric power which it generated and sold within this state as a public utility; and that it was further subject to taxation as a person engaged in the business of manufacturing electric power under the provisions of Code, 1931, 11-13-2b, as amended, upon the value of electricity generated within this state and sold and delivered to points outside of West Virginia. The Tax Commissioner asserts that the Power Company enjoys two separate and distinct privileges, each of which is taxable under the provisions of the business and occupation tax statute; that it not only serves the public as a public utility but that it also engages in the business of the manufacture of electric power.

The effect of the holding of the circuit court is that, inasmuch as the taxpayer is subject to business and occupation tax as a public utility under Code, 1931, 11-13-2d, as amended, it cannot be taxed under Section 2b of

that article as a manufacturer of electric power. Furthermore, the court held that the *sale* of electric power produced by the Power Company at its Mount Storm facility and *sold* outside of this state is a transaction in interstate commerce, that the gross income derived therefrom is specifically exempt from the tax prescribed in Section 2d and that such power sold outside the state "cannot constitutionally be taxed."

There is nothing in the business and occupation tax statute, nor is there any principle of law, of which we are cognizant, which precludes the imposition of more than one tax upon a person who is engaged in different business activities, as categorized in Code, 1931, 11-13-2a through 2j, as amended. Expressly recognizing this proposition, the Court, in *United Fuel Gas Co.* v. *Battle,* 153 W. Va. 222, 167 S.E.2d 890 (1969), unequivocally held that a public utility may be taxed under more than one provision of the business and occupation tax statute. In that case the Court sanctioned the taxability of United Fuel Gas Company as a producer of natural gas under Code, 1931, 11-13-2a, as amended, as a wholesaler of natural gas under Section 2c and as a public utility under Section 2d. See *J. D. Moore, Inc.* v. *Tax Commissioner,* 147 W. Va. 611, 129 S.E.2d 722 (1963).

The Court, in the *United Fuel* case, in determining whether said company could be taxed as a producer of natural gas, said: "It is the production of gas, not its ownership, which is subjected to taxation under Section 2a. The value of gas produced is its value when production ends which in this instance is at the well." That reasoning is clearly applicable to the instant case. Here, it is the activity or business of manufacturing electric power, not its sale, which is subject to taxation under Section 2b. We agree fully with the learned trial

judge in his holding that electric power produced in this state and sold outside of its boundaries is a transaction in interstate commerce. However, as aforesaid, the tax imposed under Section 2b is a tax on the manufacture of electric power and does not purport to tax the sale of electric power generated here and sold outside the state.

The tax sought to be imposed and collected in this case is a business and occupation tax. This is a tax on the privilege of doing business, the gross proceeds of said business being used as a measure of the tax. Section 2 of Chapter 11, Article 13 of the Code provides: "There is hereby levied and shall be collected annual privilege taxes against the persons, on account of the business and other activities, and in the amounts to be determined by the application of rates against values or gross income as set forth in sections two-a to two-j, inclusive, of this article." The Power Company admittedly is a public utility, taxable under Section 2d. It is taxable thereunder, only as a public utility, however, and only on that portion of its generated electric power sold to its utility customers in this state. No tax was imposed under Section 2d on the electric power manufactured at Mount Storm and sold without the state. The electric power manufactured in this state for sale in other states was not taxed under any provision of Article 13 of Chapter 11 of the Code.

Succinctly stated, Virginia Electric and Power Company is engaged in more than one business activity. It is a public utility wherein it supplies electricity to the public and, as such, is taxable under Code, 1931, 11-13-2d, as amended. Wherein it generates electric power at Mount Storm, it is a manufacturer under Section 2b and is subject to the tax applicable to the category described therein. Under that Code section "The measure of this

tax is the value of the entire product manufactured * * * for sale, profit or commercial use, regardless of the place of sale or the fact that deliveries may be made to points outside the State * * *." As stated, the tax imposed under Section 2b is upon the manufacture of electric power and not upon its sale.

Having decided that the manufacture of electric power, on the basis of its value at the place of manufacture, is properly taxable under Section 2b, consideration must be given to the taxpayer's contention that the imposition of such tax constitutes an unlawful burden on interstate commerce. Reference is made by the taxpayer, of course, to the manufactured electric power transmitted outside the state. The manufacture of electricity and its transmittal or sale are readily distinguishable. Manufacturing is a local activity and is not a part of interstate commerce. Commerce does not begin until the manufacture is finished. *Utah Power & Light Co.* v. *Pfost*, 286 U. S. 165, 52 S. Ct. 548, 76 L. Ed. 1038 (1932).

In *Utah Power & Light Co., supra,* the state imposed and sought to collect a license tax on the generation of electricity, even though such electricity was transmitted to an out of state consumer. It was contended that the imposition of such tax was unconstitutional as a burden on interstate commerce. The Court rejected this contention, holding that "As commerce does not begin until manufacture is finished, the commerce clause of the Federal Constitution does not prevent a state from exercising exclusive control over manufacture." See also *Crown Zellerback Corporation* v. *State*, 45 Wash. 2d 749, 278 P. 2d 305 (1954).

The Power Company, relying on the decision rendered by this Court in *Appalachian Electric Power Company* v. *Koontz*, 138 W. Va. 84, 76 S.E.2d 863 (1953), asserts

that its activity of generating electricity is a part of its operation as a public utility; that such electricity is therefore produced by a public utility, and as aforesaid, not a proper subject of the tax imposed under Section 2b; that the only measure of tax under Section 2d is on the income received by the company from sales and demand charges; that such measure is not applicable to the generation of electricity; and that the only tax to which it is subject is that under Section 2d, the measure thereof, being the income received from sales and demand charges.

The Court, in the *Appalachian Power* case, *supra*, held that the tax levied against an electric power company under Section 2d was determined solely by the amount of income it received from sales and demand charges and that such income relates only to that derived from public services furnished; that the sale of electrical appliance products, in which Appalachian was engaged, was only incidental to the public service business; and that the income from the sale of appliances was not income based on sales and demand charges. Consequently, the Court concluded, the latter sales could not be taxed under any section of Code, 1931, 11-13-2, as amended.

The effect of the taxpayers assertion here is that the generation of electricity in the instant case is analogous to the sale of electrical appliances in the *Appalachian Power* case, *supra*. It argues that such activity is incidental to and in furtherance of the public service business; that, as such, the income therefrom is not income received from sales and demand charges; that sales and demand charges constitute the only base for taxation under Section 2d; and that since generation of electric power is a part of the utility business it is not taxable under any other provision of the statute.

We are compelled to disagree with these assertions of the taxpayer. Subsequent to the decision in the *Appalachian Power Company* case, *supra*, the Legislature, in 1955, amended Section 2d, Article 13, Chapter 11 of the Code by adding the following language:

> "The measure of the tax under this section shall include only gross income received from the supplying of public services. The gross income of the taxpayer from any other activity shall be included in the measure of the tax imposed upon the appropriate section or sections of this article."

In view of our holding, hereinbefore expressed, that Virginia Electric and Power Company is operating two separate and distinct business activities, the last sentence of the above-quoted amendment of Section 2d clearly makes the *Appalachian Power Company* case, *supra*, distinguishable. As expressed in 73 C.J.S., Public Utilities, Section 9, "The fact that a business or enterprise is, generally speaking, a public utility does not make every service performed or rendered by it a public service, with the consequent duties and burdens, but it may act in a private capacity as distinguished from its public capacity, and in so doing is subject to the same rules as a private person."

Concisely stated, the Power Company is engaged in two business activities—the generation of electric power and the public utility business. The latter is taxed under Section 2d. The former cannot be taxed thereunder by reason of the measure of tax used therein. Under the amendment of Section 2d, quoted above, however, the tax "shall" be imposed under the appropriate section of the subject article, namely under Section 2b thereof as a manufacturer of electric power.

We cannot subscribe to the view of the taxpayer wherein it contends that it is engaged primarily in the public utility business in this state and that the generation of electric power is merely incidental thereto and in furtherance thereof. This is an apparent effort to bring it within the holding of the *Appalachian Power Company* case, *supra*. In that case the sale of electrical appliance products was a minute part of the company's income. In the instant case, of the electric power produced at the Mount Storm facility in 1965, 85.11% was transmitted outside the state and 14.89% was sold to customers in West Virginia. During the year 1966, 97.13% of the manufactured electricity was transmitted outside the state by the Power Company and 2.87% was sold to its domestic customers. Do these figures permit the conclusion that the generation or manufacture of electric energy at Mount Storm is a mere incident of the taxpayer's utility business? Certainly not. To so conclude would allow the "tail to wag the dog."

For the reasons stated above, we find that Virginia Electric and Power Company is subject to the tax imposed under Code, 1931, 11-13-2b and 2d, as amended, as a manufacturer of electric power and as a public utility respectively.

Holding that Virginia Electric and Power Company was not taxable as a producer of natural resources under the provisions of Code, 1931, 11-13-2a, as amended, the trial court noted, "with respect to the issue of producing stone that Plaintiff entered into a contract with the George F. Hazelwood Company for the alteration and improvement of real property, within the definition of 'contracting' as used in Code 11-13-1, rather than the production for sale, profit or commercial use of stone within the meaning of 11-13-2a, and that this being a

single transaction and not a continuous course of conduct or dealing, it is a casual or isolated transaction rather than the exercise of a taxable privilege under Article 13, Chapter 11 of the Code of West Virginia." We are in full agreement with the learned trial judge wherein he held that this activity of the Power Company is not subject to such tax.

The business and occupation tax, imposed by Code, 1931, 11-13-2, as amended, is a tax on the privilege of doing business in this State, the rates thereof being those designated in Sections 2a to 2j, inclusive, of said article. Section 2a provides: "Upon every person engaging or continuing within this State in the business of producing for sale, profit or commercial use any natural resource products, the amount of such tax to be equal to the value of the articles produced as shown by the gross proceeds derived from the sale thereof by the producer, except as otherwise provided * * *."

A careful examination of the activities of the taxpayer with regard to the provisions of Section 2a reveals, in our opinion, that it in nowise was engaged "in the business of producing for sale, profit or commercial use any natural resource products." The Power Company contracted to have the Mount Storm plant constructed. In the construction thereof, rock and stone were removed from one part of its property and placed in another part to impound water to facilitate the generation of electricity. This was a casual or isolated transaction and is not taxable as a business activity.

In expressing the above opinion we are fully aware of the language contained in Section 2, which provides that a "person exercising privileges taxable under the other sections of this article, producing * * * natural resource

products * * * and using and consuming the same in his business, shall be deemed to be engaged in the business of * * * producing * * * natural resource products for sale, profit or commercial use * * *." Furthermore, we do not hold that the sale of a natural resource product is the test of the taxability of such activity under Section 2a. However, a reading and consideration *in pari materia* of the above-quoted language of Section 2 and the definitions of "business" in Section 1, leads us to the firm conviction that this activity is not taxable under Code, 1931, 11-13-2a, as amended.

The Tax Commissioner relies on the above-quoted language of Section 2 and cites in support of his contention the decision of this Court expressed in *Owens-Illinois Glass Company* v. *Battle,* 151 W. Va. 655, 154 S.E.2d 854 (1967).

In that case, Owens-Illinois Glass Company and Libbey-Owens-Ford Glass Company severally operated manufacturing plants in Kanawha and Cabell Counties and were jointly engaged in the production of natural gas for use in the operation of their respective manufacturing plants. The taxpayers did not therein seek to avoid the payment of tax, under Section 2a, on the quantity of gas used in the manufacture of their products. They sought a refund only of the business and occupation taxes paid on the volume of the gas which was used and consumed in the process of producing gas. Denying such refund, the Court held that the production of natural gas used and consumed by the taxpayers in the process of producing natural gas for their manufacturing plants was taxable at the rate prescribed by Section 2a.

We agree with and adhere to that decision, but find it distinguishable from the instant case. In *Owens-Illinois*

there was a constant and continuing need for the production of the natural gas in question, which need would continue so long as the whole quantity of natural gas produced was used in the manufacturing process. As expressed by the Court in that case, the taxpayers were liable for the payment of such tax on the basis of the "gross volume of gas produced by them for the purpose of facilitating and promoting the operation of their manufacturing plants." This language, together with the Court's words "used *and* consumed" (emphasis supplied), and the words of Section 2, "using *and* consuming the same in his business" (emphasis supplied), clearly contemplates, in our opinion, that the production of a natural resource for use in one's business activities, to be taxable at the rate prescribed in Section 2a, must be undertaken on a continuous basis.

In *Owens-Illinois* the production of gas in question was necessarily undertaken on a continuous basis. On the other hand, the removal of rock and stone in the instant case to another site on the taxpayer's property constituted a single isolated activity. The fact that such rock and stone form a part of the dam used to facilitate the generation of electricity does not bring it within the contemplation of the words "using and consuming the same in his business." We affirm this holding of the trial court.

For the reasons stated herein, the judgment of the Circuit Court of Grant County is reversed wherein it was held that Virginia Electric and Power Company was not subject to the payment of the business and occupation tax imposed by Code, 1931, 11-13-2, as amended, at the rates prescribed in Section 2b thereof. Wherein, however, it was held that the taxpayer was not subject to the payment of business and occupation tax as a producer of natural resource products, said judgment is affirmed,

and the case is remanded for further proceedings in accordance with the principles enunciated in this opinion.

Justice Haden, deeming himself disqualified, did not participate in the consideration or decision of this case.

Affirmed in part;
reversed in part;
remanded for further
proceedings.

APPENDIX B

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 17th day of December, 1973, the following order was made and entered, to-wit:

VIRGINIA ELECTRIC AND POWER COMPANY,
a corporation, *Plaintiff Below, Appellee*

13195 vs.

RICHARD L. DAILEY, Tax Commissioner of the
State of West Virginia, *Defendant Below, Appellant*

The petition for rehearing and reargument filed in this action having been maturely considered, a majority of the Court is of opinion to, and doth hereby deny the prayer of the petition and doth order that the final order entered herein be made absolute and certified as heretofore directed. Justice Neely would grant as to appellate procedure. Justice Haden deeming himself disqualified did not participate in the consideration of this action.

A True Copy

Attest: George W. Singleton
Clerk Supreme Court of Appeals

by Barbara M. Mellace
Administrative Assistant

APPENDIX C

IN THE CIRCUIT COURT OF GRANT COUNTY, WEST VIRGINIA

VIRGINIA ELECTRIC AND POWER COMPANY, a corporation — *Plaintiff*

vs. — Civil Action No. 643

CHARLES H. HADEN, II, Tax Commissioner of the State of West Virginia — *Defendant*

JUDGMENT ORDER

This cause came on to be heard this 22nd day of June, 1971, upon all proceedings heretofore had and Orders entered herein, and more particularly pursuant to the Orders of this Court of October 3, 1970; the two Orders of October 28, 1970; and the Order of May 27, 1971, and was argued by counsel; the Plaintiff, Virginia Electric and Power Company, a corporation, being represented by Thomas N. Chambers, H. Brice Graves and James Paul Geary, its counsel, and Charles H. Haden II, Tax Commissioner of the State of West Virginia, the defendant, being represented by Louise M. Barr and William F. Carroll, Assistant Attorneys General, and Andrew N. Frye, Jr., Prosecuting Attorney of Grant County, his counsel.

At the conclusion of the argument, the Court announced its findings and conclusions with respect to the issues presented; namely, that Plaintiff was not a manufacturer of electric power taxable under Code 11-13-2b and was not taxable as a producer of stone under Code 11-13-2a; the Court being of the opinion that with respect to the manufacturing issue that the statutes, and in particular, Section 2b and 2d, considered as a whole, are

clear and unambiguous; that Plaintiff, an electric public utility, is not taxable under Section 2b but is taxable under Section 2d with respect to the conduct of its electric power business measured by sales and demand charges; that the sale of electric power produced by Plaintiff's facility at Mt. Storm and sold outside of this State is a transaction in interstate commerce and the gross income derived therefrom is specifically exempt from the measure of the tax by the express language of Section 2d; furthermore, the Court is of the opinion that such power sold without this State cannot constitutionally be taxed; the Court is further of the opinion that the statutory changes made by the Committee Substitute for House Bill No. 1078, Acts of the Legislature, 1971, tend to confirm the position of Plaintiff that the generation of power by it was not taxable under Section 2b prior to its amendment, the act reciting in part, among its purposes, the "clarification" of existing law, thus making certain that which was uncertain before; recognizing also that there is no evidence in this record that the Tax Department in past administrative practice administered the statute contrary to the position of Plaintiff; in this connection counsel for the parties having expressly disclaimed in open Court any reliance, as to the issues herein decided, upon BOT Reg 6.51 and 6.52, cited in the Tax Commissioner's administrative decision of May 5, 1969; further, the Court being of the opinion with respect to the issue of producing stone that Plaintiff entered into a contract with the George F. Hazelwood Company for the alteration and improvement of real property, within the definition of "contracting" as used in Code 11-13-1, rather than the production for sale, profit or commercial use of stone within the meaning of 11-13-2a, and that this being a single transaction and not a continuous course of conduct or dealing, it is a casual or isolated transaction

rather than the exercise of a taxable privilege under Article 13, Chapter 11 of the Code of West Virginia.

The parties having stipulated (Stipulation 10) that if this Court should hold that Virginia Electric and Power Company is not taxable as a manufacturer under West Virginia Code 11-13-2b and that Virginia Electric and Power Company is not taxable as a producer of stone under West Virginia Code 11-13-2a, there is no tax deficiency, and judgment should be entered in favor of Virginia Electric and Power Company without any further proceedings in this case, and the Court having so held, it is therefore, ADJUDGED, ORDERED and DECREED that the deficiency assessment of Business and Occupation Tax in the sum of $159,143.32, together with penalty thereon in the sum of $33,903.64, aggregating in all, the amount of $193,046.96, made by the Defendant Tax Commissioner in his administrative decision or ruling bearing date the 5th day of May, 1969, against the Plaintiff, Virginia Electric and Power Company, a corporation, be, and the same is hereby expunged, voided and held for naught.

To each of which said rulings by the Court the defendant, by his counsel, objected and excepted.

Thereupon, the defendant, by his said counsel, moved that the Court rehear and reconsider its rulings as to the two stipulated issues aforesaid, and set aside and vacate its judgment expunging and avoiding defendant's said assessment of Business and Occupation Tax and penalty against the plaintiff, and rehear and reconsider its decisions thereon, and upon rehearing to affirm defendant's administrative ruling in these particulars, to-wit: (1) that plaintiff was taxable as a manufacturer of electric power under the provisions of Chapter 11, Article 13,

Section 2b, West Virginia Code of 1931, as amended, and (2) that plaintiff was taxable as a producer of stone under the provisions of Chapter 11, Article 13, Section 2a, West Virginia Code of 1931, as amended, and counsel for the defendant further moved that upon affirming defendant's administrative decision as to said two (2) issues, this cause be remanded to the defendant Tax Commissioner for the purpose of (1) ascertaining the measure of the value per kilowatt hour of the electric power manufactured by the plaintiff to be used in computing the value of the electric power subject to the tax; and (2) ascertaining the correctness of the measure of the quantity and value of the stone produced by the plaintiff to be used in computing the tax thereon.

Whereupon, the Court, after consideration thereof, does hereby DENY each of said motions, to which action of the Court the defendant, State Tax Commissioner, by his said counsel does hereby object and except.

Dated this 22nd day of June, 1971.

Presented by:
Thomas N. Chambers
Counsel for Plaintiff

ENTER: D. E. Cuppett, Jr.
Judge

Inspected by:

Louise M. Barr
Counsel for Defendant

APPENDIX D

BEFORE THE TAX COMMISSIONER OF THE STATE OF WEST VIRGINIA

In the Matter of the Petition of	)	
VIRGINIA ELECTRIC AND	)	
POWER COMPANY	)	22 625 205 738 56 B
Richmond	)	
Virginia 23209	)	

TAX COMMISSIONER PRESENT:

G. Thomas Battle

TAXPAYER REPRESENTED BY:

H. Brice Graves and Evans B. Brasfield, Counsel, and A. M. Clement, Senior Assistant Treasurer

TAX COMMISSIONER REPRESENTED BY:

Paul R. Goode, Jr. and William F. Carroll, Assistant Attorneys General, R. R. Ranson, Assistant Director, Business and Occupation Tax Division, and John J. Innes, Director, Auditing Division

DATE AND PLACE OF HEARING:

November 1, 1967
Charleston, West Virginia

Pursuant to audit made of the records of the above-styled taxpayer, on August 8, 1967, the then Tax Commissioner of West Virginia, G. Thomas Battle, issued an assessment of Business and Occupation Tax liability, pursuant to the provisions of Chapter 11, Article 13 of the Code of West Virginia of 1931, as amended, against the said taxpayer for the period 1962 through 1966 for taxes in the amount of $277,922.40 and penalties in the amount of $51,821.07, for a total liability of $329,743.47.

Subsequently, pursuant to Petition for Reassessment, timely filed by the taxpayer, and hearing date set and hearing held with evidence being presented at such hearing and argument of counsel thereon, Charles H. Haden II, Tax Commissioner of West Virginia, is of the opinion that the said State's assessment ought to be and is hereby amended and adjusted as hereinafter provided.

FACTS

AREA ONE:

Virginia Electric and Power Company, a corporation, is hereinafter referred to as "Vepco". Vepco is a public utility organized under the laws of the State of Virginia and duly qualified to engage in business as a public utility within West Virginia. Such corporation has paid taxes to the State of West Virginia, as a public utility, under Section 2d of Article 13, Chapter 11, (being the Business and Occupation Tax law of this State). Vepco generates electricity within West Virginia at its Mount Storm Power Station in Grant County, West Virginia, which electricity after generation is immediately transmitted to substations in Virginia, with the majority of such electrical power being thereafter sold outside the boundaries of this State, but with some portion thereof returning and being sold within the boundaries of this State to certain of its utility customers. Thus, the facts relating to the generated electric power and transmission thereof are not in dispute but only the question of law as hereinafter developed.

AREA TWO:

In the course of site preparation and construction of Vepco's Mount Storm power station in Grant County, West Virginia, a cooling water reservoir was constructed by damming the Stony River with an earth and rock

fill dam. This activity resulted in rock being commercially produced as a natural resource, and used in such damming. The evidence showed that Vepco had title and ownership of such rock, located on Vepco property, and Garbart Construction Company contracted to attend to the incorporation of such rock, owned by Vepco, into the said dam. Thus, the material facts concerning the production of such rock are not in dispute but only the question of law as hereinafter developed.

AREA THREE:

Vepco raised an issue of fact that the State's assessment was in error in that 434,205 cubic yards of stone, produced in 1962, was erroneously doubled or duplicated by being included in the computation by the State in the year 1962 and again in the year 1963. This fact has been determined to be correct and the said duplication has been removed from the State's assessment with the determination of tax and penalties owing being accordingly amended and reduced.

AREA FOUR:

Taxpayer alleges that the determination of the Tax Commissioner that certain of its minor receipts should be reclassified from the service classification, as reported by taxpayer, to the furnishing of real and personal property for hire, rentals, etc. classification, is not objected to and is not in dispute, but has been conceded by taxpayer.

QUESTIONS OF LAW AND DETERMINATIONS

FIRST:

The question of law raised in Area One, above, involving the liability of Vepco to report and pay as a person engaged in the business of manufacturing electric energy

within this State is controlled by Sections 2 and 2b, of Article 13, Chapter 11. Under the language of Section 2b, a person who generates or produces electric power is specifically deemed to be a *manufacturer,* with the following underlined language of such section being particularly pertinent:

> "Upon every person engaging or continuing within this State in the business of manufacturing, compounding or preparing for sale, profit, or commercial use, either directly or through the activity of others in whole or part, any article or articles, substance or substances, commodity or commodities, or *electric power not produced by public utilities taxable under other provisions of this article,* the amount of the tax to be equal to the value of the article, substance, commodity or *electric power manufactured, compounded or prepared for sale,* as shown by the gross proceeds derived from the sale thereof by the manufacturer or person compounding or preparing the same, except as otherwise provided, multiplied by a rate of eight tenths of one percent. *The measure of this tax is the value of the entire product manufactured,* compounded or prepared in this State for sale, profit or commercial use, *regardless of the place of sale or the fact that deliveries may be made to points outside the State.*"

Section 2, wherein this privilege tax is imposed, requires the Tax Commissioner to determine value, in certain instances, and particularly where a *manufactured* product leaves this State without sale having occurred or where a producer or manufacturer, itself, consumes the product rather than selling to another. Section 2 states:

> "In determining *value,* however, as regards sales from one to another of affiliated companies or persons, or under other circumstances where the relation between the buyer and seller is such that the

gross proceeds from the sale are not indicative of the true value of the subject matter of the sale, *the tax commissioner shall prescribe uniform and equitable rules for determining the value* upon which such privilege tax shall be levied, corresponding as nearly as possible to the gross proceeds from the sale of *similar products of like quality or character* where no common interest exists between the buyer and seller but the circumstances and conditions are otherwise similar."

Uniform and equitable rules have been promulgated pursuant to the legislative mandate to the Tax Commissioner and are Regulations BOT 6.51 and BOT 6.52, heretofore promulgated and filed in the Office of the Secretary of State, and in full force and effect during the years involved in the assessment here in issue.

The aforesaid Section 2b and Regulations BOT 6.51 and 6.52 have been consistently administered to require that a person paying tax under Section 2d on electric power sold by it as a public utility, must also pay tax as a *manufacturer,* on that electric power manufactured and not sold as a public utility. It is the taxpayer's contention that certain of its electric power was taxable under Section 2d, (utility sales) and to this extent it is engaged in the business of making utility sales of electric power within this State; therefore, taxpayer is not required to report and pay tax as a *manufacturer* of electric power under said Section 2b. The Tax Commissioner having rejected this contention, concludes that the electric power generated and not involved in utility sales within this State is subject to taxation under Section 2b.

Ancillary to the legal issue hereinbefore determined is the measure or value of the generated electric power to be used in determining the liability of such manufacturer under Section 2b. In this regard, any proper de-

termination must turn upon the duty placed upon the Tax Commissioner to look to gross proceeds from sales of similar products between buyers and sellers not having a common interest and as controlled by Regulation BOT 6.52, which is applicable where value is to be determined in the absence of sale within this State. It is the position of the Tax Commissioner that his investigation determines and pinpoints the value of electric power for the year 1965 to be 8.856 mills per kilowatt-hour, and for the year 1966, 8.512 mills per kilowatt-hour; these values being determined as the average kilowatt-hour charge of others generating and selling electric power within the Mount Storm area. With such determination, the State's assessment wherein a larger value was used, is adjusted and modified.

SECOND:

The question of law raised in Area Two, above, concerning production of a natural resource, that is the rock and stone owned by Vepco and incorporated into the dam is controlled by the following: Section 1 (the definition section) of Article 13, Chapter 11, and more particularly, the definition of "Service, business or calling", therein establishes that Garbart Construction Company was performing a service in commercially using "articles, substances, or commodities which are owned by another" (stone owned by Vepco) and that Vepco as owner of such stone is required to pay under Section 2a because it is producing for commercial use a natural resource (limestone and sandstone), which natural resource is specifically taxable at a rate of 2% in said section.

THIRD:

The final question of law raised is Vepco's exception to the imposition of penalties, in the State's assessment.

Penalties attach automatically by the force and effect of the clear provisions of Section 11, but are waivable in whole or in part by the Tax Commissioner upon a showing of reasonable cause on the part of the taxpayer for failure to remit in whole or in part the proper amount of tax as ultimately determined to be owing. The Tax Commissioner determines that the evidence in the instant proceeding failed to establish any reasonable cause for failure to remit, timely, the liability here in issue and therefore declines to waive such penalties, either in whole or in part.

Therefore, it is the Decision of Charles H. Haden II, Tax Commissioner of West Virginia, that Virginia Electric and Power Company, a corporation, is indebted to the State of West Virginia for the period 1962 through 1966 for an adjusted Business and Occupation Tax liability of tax in the amount of $159,143.32 and penalties in the amount of $33,903.64 for a total adjusted liability of $193,046.96.

Done this 5th day of May, 1969.

Charles H. Haden II
State Tax Commissioner

APPENDIX E

(Caption omitted)

PETITION FOR REHEARING ON BEHALF OF VIRGINIA ELECTRIC AND POWER COMPANY

TO THE HONORABLES, THE JUSTICES OF THE SUPREME COURT OF APPEALS:

Virginia Electric and Power Company, appellee in the above captioned case, decided by this Honorable Court, July 24, 1973, does respectfully petition for a rehearing with respect to the holdings of this Honorable Court—

1. That "(A) public utility engaged in the manufacture of electric power is subject to the payment of the tax prescribed in Code, 1931, 11-13-2, as amended, at the rate provided in Section 2b thereof, upon the value of all electric power so manufactured and transmitted outside of the state" (Syllabus point No. 2), and

2. To the further holdings of this Honorable Court, not reflected in any syllabus point, relating to the nature of a tax appeal from a decision of the State Tax Commissioner under Code 11-13-8, and in particular with respect to the following holdings appearing at pages 9 and 10 of the typewritten opinion, to-wit:

> a. "[T]hat a hearing and determination anew, as provided in said Section 8, means that the Circuit Court shall make a judicial determination of the correctness of the administrative decision, but that it does not permit such court to receive new evidence in making a determination of the issue;"
>
> b. "To allow the circuit court to determine an issue on evidence not considered at the administrative hearing would cast the court in the role of performing an executive function," and

c. "While we are not cognizant of any principle of law or authority which would permit the tax commissioner, as a matter of law, to withdraw his administrative decision and thereby oust the circuit court of jurisdiction, we are of the opinion and so hold that the court in its inherent powers has the authority in the circumstances described above to remand the case to the tax commissioner for the taking of further evidence."

In support of its petition the taxpayer respectfully shows, states and avers, as follows:

1. As to the holding that petitioner was taxable as a manufacturer of electric power:

a. If it is the finding of this Honorable Court, as stated in Syllabus Point No. 2, that petitioner is "a public utility engaged in the manufacture of electric power" it is clear that such activity by a public utility is not taxable under section 2b.

b. If, however, it was the intention of this Honorable Court to state, as to electricity generated at Mount Storm, that petitioner was acting in a private capacity as to that portion of the electricity shipped out of state (see opinion pp. 17, 18), the petitioner submits that such conclusion is contrary to the facts as found by this Honorable Court and as stipulated by the parties (opinion, pp. 2, 3) and is contrary to and in conflict with the rationale of the decision of this Honorable Court in *United Fuel Gas Co.* v. *Battle*, 153 W. Va. 222, 244-248, 167 S.E.2d 809, 904-905 (1969) where this Court resorted to Chapter 24 of the West Virginia Code to determine the meaning to be accorded to the term "public service or utility business."

2. As to the nature of an appeal from the decision of the Tax Commissioner under Code, Chapter 11, Article 13:

a. Your petitioner submits that the holding of this Court, while not expressed in any syllabus point, involve matters of great importance not only to your petitioner but to taxpayers, generally, and merit the most careful consideration.

b. The holding of this Honorable Court is manifestly contrary to the plain wording of the statute.

c. The holding that the Circuit Court must decide the case on the evidence in the record as it was received from the Tax Commissioner will leave taxpayers without those fundamental due process and other procedural safeguards necessary to the fair administration of justice and will permit an adversary party to adjudicate a disputed claim in violation of the ancient precept that no man shall be the judge of his own cause.

d. The taking of evidence by a Circuit Court incident to its judicial determination of the correctness of tax assessment does not cast the Court in the role of performing an executive function.

e. Petitioner should be given the further opportunity to brief and argue so important an issue not fully developed in its brief heretofore filed with this Honorable Court.

Your petitioner would further show unto your Honors that it will readily appear that said opinion is erroneous in the matters hereinabove complained of when the petition and accompanying brief are examined and the stipulation, exhibits and brief of petitioner, heretofore filed in this proceeding are re-examined and considered, all of which are made a part of this petition.

Your petitioner, therefore, prays that this Honorable Court grant to petitioner a rehearing of this cause; that

the procedural issue be calendared for oral argument and that the said opinion and decision of this Court be corrected as to the matters of error set forth and, to such extent that said opinion be set aside and annulled; that the final judgment of the Circuit Court of Grant County be affirmed and that this Court grant petitioner such other and further relief as to it shall seem meet and proper.

VIRGINIA ELECTRIC AND POWER COMPANY,
Petitioner

By Counsel

OF COUNSEL
[Names omitted]
Date: August 22, 1973

APPENDIX F

Constitutional Provisions and Statutes Involved
United States Constitution

ARTICLE I

Section 8

[Powers of Congress]

The Congress shall have Power

* * * *

To regulate Commerce with foreign Nations, and among the several States and with the Indian Tribes;

* * * *

[AMENDMENT V]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

* * * *

[AMENDMENT XIV]

Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge

the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * * *

Constitution of West Virginia

* * * *

ARTICLE V

Division of Powers

§ 1. The legislative, executive and judicial departments shall be separate and distinct, so that neither shall exercise the powers properly belonging to either of the others; nor shall any person exercise the powers of more than one of them at the same time, except that justices of the peace shall be eligible to the legislature.

* * * *

Code of West Virginia of 1931, as amended (1962-1966)

Chapter 11—Taxation

Article 13—Business and Occupation Tax

* * * *

§ 11-13-2. Imposition of privilege tax.

There is hereby levied and shall be collected annual privilege taxes against the persons, on account of the business and other activities, and in the amounts to be determined by the application of rates against values or gross income as set forth in sections two-a to two-j, inclusive, of this article.

If any person liable for any tax under sections two-a or two-b shall ship or transport his products or any part thereof out of the State without making sale of such products, the value of the products in the condition or form in which they exist immediately before transporta-

tion out of the State shall be the basis for the assessment of the tax imposed in said sections, except in those instances in which another measure of the tax is expressly provided. The tax commissioner shall prescribe equitable and uniform rules for ascertaining such value.

In determining value, however, as regards sales from one to another of affiliated companies or persons, or under other circumstances where the relation between the buyer and seller is such that the gross proceeds from the sale are not indicative of the true value of the subject matter of the sale, the tax commissioner shall prescribe uniform and equitable rules for determining the value upon which such privilege tax shall be levied, corresponding as nearly as possible to the gross proceeds from the sale of similar products of like quality or character where no common interest exists between the buyer and seller but the circumstances and conditions are otherwise similar.

Gross income included in the measure of the tax under sections two-a and two-b of this article, except in the case of production of natural gas, shall neither be added nor deducted in computing the tax levied under the other sections of this article.

A person exercising any privilege taxable under sections two-a or two-b of this article and engaging in the business of selling his natural resources or manufactured products at retail in this State shall be required to make returns of the gross proceeds of such retail sales and pay the tax imposed in section two-c of this article for the privilege of engaging in the business of selling such natural resources or manufactured products at retail in this State. But any person exercising any privilege taxable under sections two-a or two-b of this article and engaging in the business of selling his natural resources or manufactured products to producers of natural re-

sources, manufacturers, wholesalers, jobbers, retailers or commercial consumers for use or consumption in the purchaser's business shall not be required to pay the tax imposed in section two-c of this article.

Manufacturers exercising any privilege taxable under section two-b of this article shall not be required to pay the tax imposed in section two-c of this article for the privilege of selling their manufactured products for delivery outside of this State, but the gross income derived from the sale of such manufactured products outside of this State shall be included in determining the measure of the tax imposed on such manufacturer in section two-b.

A person exercising privileges taxable under the other sections of this article, producing coal, oil, natural gas, minerals, timber or other natural resource products the production of which is taxable under section two-a, and using or consuming the same in his business, shall be deemed to be engaged in the business of mining and producing coal, oil, natural gas, minerals, timber or other natural resource products for sale, profit or commercial use, and shall be required to make returns on account of the production of the business showing the gross proceeds or equivalent in accordance with uniform and equitable rules for determining the value upon which such privilege tax shall be levied, corresponding as nearly as possible to the gross proceeds from the sale of similar products of like quality or character by other taxpayers, which rules the tax commissioner shall prescribe.

* * * *

§ 11-13-2b. Manufacturing, compounding or preparing products; processing of poultry and turkeys excepted.

Upon every person engaging or continuing within this State in the business of manufacturing, compounding or

preparing for sale, profit, or commercial use, either directly or through the activity of others in whole or part, any article or articles, substance or substances, commodity or commodities, or electric power not produced by public utilities taxable under other provisions of this article, the amount of the tax to be equal to the value of the article, substance, commodity or electric power manufactured, compounded or prepared for sale, as shown by the gross proceeds derived from the sale thereof by the manufacturer or person compounding or preparing the same, except as otherwise provided, multiplied by a rate of four tenths of one per cent. The measure of this tax is the value of the entire product manufactured, compounded or prepared in this State for sale, profit or commercial use, regardless of the place of sale or the fact that deliveries may be made to points outside the State. However, the dressing and processing of poultry and turkeys by a person, firm or corporation, which poultry and turkeys are to be sold on a wholesale basis by such person, firm or corporation shall not be considered as manufacturing or compounding, but the sale of these products on a wholesale basis shall be subject to the same tax as is imposed on the business of selling at wholesale as provided in section two-c.

It is further provided, however, that in those instances in which the same person partially manufactures products within this State and partially manufactures such products outside of this State the measure of his tax under this section shall be that proportion of the sale price of the manufactured product that the payroll cost of manufacturing within this State bears to the entire payroll cost of manufacturing the product; or, at the option of the taxpayer, the measure of his tax under this section shall be the proportion of the sales value of the articles that

the cost of operations in West Virginia bears to the full cost of manufacture of the articles.

* * * *

§ 11-13-2d. Public service or utility business.

Upon any person engaging or continuing within this State in any public service or utility business, except railroad, railroad car, express, pipeline, telephone and telegraph companies, water carriers by steamboat or steamship and motor carriers, there is likewise hereby levied and shall be collected taxes on account of the business engaged in equal to the gross income of the business multiplied by the respective rates as follows: Street and interurban and electric railways, one and three tenths per cent; water companies, four per cent except as to income received by municipally-owned water plants; electric light and power companies, five and two tenths per cent on sales and demand charges for domestic purposes and commercial lighting and three and nine tenths per cent on sales and demand charges for all other purposes, except as to income received by municipally-owned plants producing or purchasing electricity and distributing same; natural gas companies, three and nine tenths per cent on the gross income, said gross income for this purpose to be determined by deducting from gross income from all sales of gas to consumers the amount of the tax paid by the taxpayer under section two-a of this article on the production of the same gas; toll bridge companies, three and nine tenths per cent; and upon all other public service or utility business, two and six tenths per cent. The measure of this tax shall not include gross income derived from commerce between this State and other states of the United States or between this State and foreign countries. The measure of the tax under this section shall include only gross income received from the

supplying of public services. The gross income of the taxpayer from any other activity shall be included in the measure of the tax imposed upon the appropriate section or sections of this article.

* * * *

§ 11-13-7. Assessment of tax when insufficiently returned.

If the tax commissioner believes that the tax imposed by this article is insufficiently returned by a taxpayer, either because the taxpayer has failed to properly remit the tax or has failed to make a return, or has made a return which is incomplete, deficient or otherwise erroneous, he may proceed to investigate and determine or estimate the tax liability of the taxpayer and make an assessment therefor.

* * * *

§ 11-13-7b. Notice of assessment; petition for reassessment; hearing.

The tax commissioner shall give to the taxpayer written notice of any assessment made pursuant to this article. Unless the taxpayer to whom a notice of assessment is directed shall, within thirty days after service thereof (except in the case of jeopardy assessments), either personally or by certified mail, file with the tax commissioner a petition in writing, verified under oath by said taxpayer or his duly authorized agent, having knowledge of the facts, setting forth with definiteness and particularly the items of the assessment objected to, together with the reason for such objections, said assessment shall become and be deemed conclusive and the amount thereof shall be payable at the end of the thirty-day period. In every case where a petition for reassessment as above described is filed, the tax commissioner shall assign a time and place for the hearing of same and shall notify the petitioner of such hearing by written

notice at least twenty days in advance thereof and such hearing shall be held within sixty days from the filing of the petition for reassessment unless continued by agreement or by the tax commissioner for good cause. The hearing shall be informal and may be conducted by an examiner designated by the tax commissioner. At such hearing evidence may be offered to support the assessment or to prove that it is incorrect. After such hearing the tax commissioner shall, within a reasonable time, give notice in writing of the decision. Unless an appeal is taken within thirty days from service of this notice, the tax commissioner's decision shall be final.

* * * *

§ 11-13-8. Appeal.

An appeal may be taken by the taxpayer to the circuit court of the county in which the activity taxed was engaged, or in which the taxpayer resides, or in the circuit court of Kanawha county, within thirty days after he shall have received notice from the tax commissioner of his determination as provided in section seven-b.

The appeal shall be taken by written notice to the tax commissioner and served as an original notice. When said notice is so served it shall, with the return thereon, be filed in the office of the clerk of the circuit court and docketed as other cases with the taxpayer as plaintiff and the tax commissioner as defendant. Before the appeal is heard, the plaintiff shall file with such clerk a bond for the use of the defendant, with sureties approved by said clerk, the penalty of the bond to be not less than the total amount of the tax and penalties appealed from, and conditioned that the plaintiff shall perform the orders of the court; except that in lieu of said bond, the tax commissioner may upon a proper showing find and certify to said clerk that the properties of the plaintiff subject to

the liens imposed by sections twelve and fourteen of this article are adequate to secure the performance of the orders of the court.

The court shall hear the appeal and determine anew all questions submitted to it on appeal from the determination of the tax commissioner. In such appeal a certified copy of the tax commissioner's assessment shall be admissible and shall constitute prima facie evidence of the tax due under the provisions of this article. The court shall render its decree thereon and a certified copy of said decree shall be filed by the clerk of said court with the tax commissioner who shall then correct the assessment in accordance with said decree. An appeal may be taken by the taxpayer or the tax commissioner to the supreme court of appeals of this State.

SUPREME COURT, U. S.

MAR 12 1974

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1246

VIRGINIA ELECTRIC AND POWER COMPANY,
a corporation,
Petitioner,

v.

CHARLES H. HADEN, II, TAX COMMISSIONER, ETC., REVIVED IN THE NAME OF RICHARD L. DAILEY, Tax Commissioner, etc.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

RESPONDENT'S BRIEF IN OPPOSITION

WILLIAM F. CARROLL
Assistant Attorney General
State of West Virginia
Room 26-E, State Capitol
Charleston, West Virginia 25305
Attorney for Respondent

Of Counsel

CHAUNCEY H. BROWNING, JR.
Attorney General
State of West Virginia
Room 26-E, State Capitol
Charleston, West Virginia 25305

JARRETT PRINTING COMPANY, CHARLESTON, W. VA.

TABLE OF CONTENTS

Page

REFERENCES TO WEST VIRGINIA STATUTES; TO THE PETITION; AND TO THE RECORD ... 1

ARGUMENT

1. THE PROCEDURES FOR ADMINISTRATIVE REVIEW OF DEFICIENCY TAX ASSESSMENTS AFFORDED BY THE WEST VIRGINIA STATUTES DO NOT DENY DUE PROCESS. ... 2

   a. Petitioner's claim of procedural due process violation is based solely upon the assumption of inherent unfairness. ... 2

   b. The West Virginia tax system in general; administrative and judicial review of deficiency assessments affords taxpayers full due process protection under the decisions of this Court. ... 4

   c. Petitioner failed to exhaust its administrative remedies; petition for writ of certiorari is premature. ... 11

2. THE DECISION OF THE SUPREME COURT OF APPEALS OF WEST VIRGINIA IS CLEARLY CORRECT AND NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED. ... 18

CONCLUSION ... 22

TABLE OF CASES

Page

Baldwin v. *Iowa State Traveling Men's Assoc.*, 283 U.S. 522, 51 S. Ct. 517, 75 L. Ed. 1244 (1931); 17

Beck v. *Missouri Valley Drainage Dist.*, 46 F.2d 632 (8th Cir. 1931), *cert. den.*, 284 U.S. 618, 52 S. Ct. 75, 76 L. Ed. 527; 17

Center for Participant Education v. *Marshall*, 337 F. Supp. 126 (N.D. Fla. 1972); 11

Danielley v. *City of Princeton*, 113 W.Va. 252, 167 S.E. 620 (1933); 15

Davidson v. *New Orleans*, 96 U.S. 97, 24 L. Ed. 616 (1878); 17

District of Columbia v. *Clawans*, 300 U.S. 617, 57 S. Ct. 660, 81 L. Ed. 843 (1937); 17

Federal Trade Com. v. *Cement Institute*, 333 U.S. 683, 68 S. Ct. 793, 92 L. Ed. 1010 (1948); 10

Hannah v. *Larche*, 363 U.S. 420, 80 S. Ct. 1502, 4 L. Ed. 2d 1307 (1960); 4

Herman v. *University of South Carolina*, 341 F. Supp. 226 (D. S.C. 1971), *affirmed*, 457 F.2d 902 (4th Cir. 1972); 11

Hodges v. *Public Service Commission*, 110 W.Va. 649, 159 S.E. 834 (1931); 15

In re Murchison, 349 U.S. 133, 75 S. Ct. 623, 99 L. Ed. 942 (1955); 9

Intercontinental Indus., Inc. v. *American Stock Exchange*, 542 F.2d 935 (5th Cir. 1971), *cert. den.*, 409 U.S. 842, 34 L. Ed. 2d 81, 93 S. Ct. 41 (1972); 11

Jenkins v. *McKeithen*, 395 U.S. 411, 89 S. Ct. 1843, 23 L. Ed. 2d 404 (1969); 8

Kennecott Copper Corporation v. *F. T. C.*, 467 F.2d 67 (10th Cir. 1972) (U.S. App. pending); 10

Page

Lindsey v. *Normet*, 405 U.S. 56, 92 S. Ct. 862, 31 L. Ed. 2d 36 (1972); 17

Lott v. *Pittman*, 243 U.S. 588, 37 S. Ct. 473, 61 L. Ed. 915 (1917); 17

Luckenbach S.S. Co. v. *United States*, 272 U.S. 533, 47 S. Ct. 186, 71 L. Ed. 394 (1926); 17

McMillen v. *Anderson*, 95 U.S. 37, 24 L. Ed. 335 (1877); 17

Murray's Lessee v. *Hoboken Land & Improvement Co.*, 18 How. 272 (Vol. 59 U.S.), 15 L. Ed. 372 (1856); 17

Offutt v. *United States*, 348 U.S. 11, 75 S. Ct. 11, 99 L. Ed. 11 (1954); 9

Ogletree v. *McNamara*, 449 F.2d 93 (6th Cir. 1971); 11

Ohio ex rel. Bryant v. *Akron Metropolitan Park Dist.*, 281 U.S. 74, 50 S. Ct. 228, 74 L. Ed. 710 (1930); 17

Ortwein v. *Schwab*, ... U.S. ....., 93 S. Ct. ....., 35 L. Ed. 2d 572 (1973); 17

Owens-Illinois Glass Company, et al. v. *Battle, State Tax Commissioner*, 151 W.Va. 655, 154 S.E.2d 854 (1967); 19

Richardson v. *Perales*, 402 U.S. 389, 91 S. Ct. 1420, 28 L. Ed. 2d 842 (1971); 8, 9, 10, 16

Sims v. *Fisher*, 125 W.Va. 512, 25 S.E.2d 216 (1943); 15

Tietze v. *Richardson*, 342 F. Supp. 610 (S.D. Tex. 1972); 11

United States v. *Litton Industries, Inc.*, 462 F.2d 14 (9th Cir. 1972); 10, 11

Utah Power and Light Company v. *Pfost*, 286 U.S. 165, 52 S. Ct. 548, 76 L. Ed. 1038 (1932); 21

Page

Virginia Electric & Power Co. v. *Haden*, 200 S.E.2d 848 (W.Va. 1973); 2, 16

Walter Butler Building Co. v. *Soto*, 142 W.Va. 616, 97 S.E.2d 275 (1957); 15

Winnick v. *Manning*, 460 F.2d 545 (2d Cir. 1972); 11

Wisconsin v. *J. C. Penney Co.*, 311 U.S. 435, 61 S. Ct. 246, 85 L. Ed. 267 (1940); 3

STATUTES

Chapter 6, Article 7, Section 2a, West Virginia Code of 1931, as amended; 5, 9

Chapter 11, Article 1, Section 1, West Virginia Code of 1931, as amended; 5

Chapter 11, Article 11, West Virginia Code of 1931, as amended; 5

Chapter 11, Article 11, Section 21, West Virginia Code of 1931, as amended; 6

Chapter 11, Article 12, West Virginia Code of 1931, as amended; 5

Chapter 11, Article 12A, West Virginia Code of 1931, as amended; 5

Chapter 11, Article 13, West Virginia Code of 1931, as amended; 5, 6, 14, 19

Chapter 11, Article 13, Section 2, West Virginia Code of 1931, as amended; 18, 19

Chapter 11, Article 13, Section 2a, West Virginia Code of 1931, as amended; 14

Chapter 11, Article 13, Section 2b, West Virginia Code of 1931, as amended; 14, 18, 21

Chapter 11, Article 13, Section 2c, West Virginia Code of 1931, as amended; 22

Chapter 11, Article 13, Section 2d, West Virginia Code of 1931, as amended; 21

Chapter 11, Article 13, Section 7, West Virginia Code of 1931, as amended; 12

Chapter 11, Article 13, Section 7b, West Virginia Code of 1931, as amended; 6, 7

Chapter 11, Article 13, Section 8, West Virginia Code of 1931, as amended; 14

Chapter 11, Article 14, West Virginia Code of 1931, as amended; 5

Chapter 11, Article 14A, West Virginia Code of 1931, as amended; 5

Chapter 11, Article 15, West Virginia Code of 1931, as amended; 5

Chapter 11, Article 15A, West Virginia Code of 1931, as amended; 5

Chapter 11, Article 17, West Virginia Code of 1931, as amended; 5

Chapter 11, Article 19, West Virginia Code of 1931, as amended; 5

Chapter 11, Article 21, West Virginia Code of 1931, as amended; 5

Chapter 11, Article 21, Section 82, West Virginia Code of 1931, as amended; 6

Chapter 11, Article 24, West Virginia Code of 1931, as amended; 5

Chapter 51, Article 2, Section 13, West Virginia Code of 1931, as amended; 9

CONSTITUTIONAL PROVISIONS

Constitution of the United States, Article I, Section 8 (the Commerce Clause); 20, 21

West Virginia Constitution, Article V, Section 1. 15

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1246

VIRGINIA ELECTRIC AND POWER COMPANY,
a corporation,
Petitioner,

v.

CHARLES H. HADEN, II, TAX COMMISSIONER, ETC., REVIVED IN THE NAME OF RICHARD L. DAILEY, Tax Commissioner, etc.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

RESPONDENT'S BRIEF IN OPPOSITION

REFERENCES TO WEST VIRGINIA STATUTES; TO THE PETITION; AND TO THE RECORD

The tax statutes of the State of West Virginia are incorporated in Chapter 11, West Virginia Code of 1931, as amended, divided into various articles. References in this brief to a particular article will be by Code 11-__. References to a particular section of an article will be by Code 11-__-__. For example, reference to Chapter 11, Article 13, Section 2b, will be Code 11-13-2b. Reference

to any other chapter, article, and section of said Code will be by Code ---.

References to the petition for writ of certiorari will be made herein as P. ---.

References to the record and to exhibits in the record will be made pursuant to Rule 40 of the Court.

ARGUMENT

1.

THE PROCEDURES FOR ADMINISTRATIVE REVIEW OF DEFICIENCY TAX ASSESSMENTS AFFORDED BY THE WEST VIRGINIA STATUTES DO NOT DENY DUE PROCESS, AND PETITIONER WAS NOT, ON THE RECORD, DENIED ANY CONSTITUTIONAL RIGHT BY THE RESPONDENT OR BY THE DECISION OF THE COURT BELOW.

a. Petitioner's claim of procedural due process violation is based solely upon the assumption of inherent unfairness.

In urging this Court to grant certiorari the petitioner maintains, in essence, that the West Virginia system establishing administrative review by the State Tax Commissioner of his deficiency tax assessments is constitutionally unfair.

Petitioner argues, P. 10 through 15, that it was denied constitutional due process of law by the decision complained of, *Virginia Electric & Power Co.* v. *Haden*, reported in 200 South Eastern Reporter, 2nd Series, pp. 848 through 858 (W.Va. 1973). Denial of due process of law is posited in this language, P. 10:

> "The Court below held that a hearing upon appeal of the administrative decision of the State Tax Commissioner is limited to a judicial review upon

> the record. As a result, the administrative hearing held by the Tax Commissioner becomes the trial, the place where the evidence is introduced, *and the dual role of the State Tax Commissioner, as an adversary party and as the hearing officer, denies petitioner due process of law.*" (Emphasis supplied.)

Petitioner expands the basic assumption of denial of constitutional due process to embrace all tax collection activities of the West Virginia Tax Commissioner, P. 13:

> "*The Tax Commissioner's duties as the tax collector for the State are inherently in conflict with the adjudicatory function involved in passing upon the correctness of a tax assessment made by him.*
>
> * * *
>
> "*The West Virginia system, as judicially construed, is plainly inadequate.* Moreover, it cannot be said that the defects of this patently unfair administrative adjudicatory process are cured by subsequent judicial review of the tax administrator's decision (made on the administrative record)." (Emphasis supplied.)

However, the Constitution of the United States is not a formulary. It does not demand of states strict observance of rigid categories nor precision of technical phrasing in their exercise of the most basic power of government, that of taxation. *Wisconsin* v. *J. C. Penney Co.*, 311 U.S. 435, 61 S. Ct. 246, 85 L. Ed. 267 (1940), at page 270 (L. Ed.). This Court has described constitutional due process as "an illusive concept"; its exact boundaries undefined and its content varied according to specific factual contexts. When governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally

been associated with the judicial process. *Hannah* v. *Larche*, 363 U.S. 420, 80 S. Ct. 1502, 4 L. Ed. 2d 1307 (1960). The Court indicated its basic approach to due process in *Hannah* v. *Larche, supra,* at p. 1321 (L. Ed. 2d) of the opinion:

> "* * * Therefore, as a generalization, it can be said that due process embodies the differing rules of fair play, which through the years, have become associated with differing types of proceedings. Whether the Constitution requires that a particular right obtain in a specific proceeding depends upon a complexity of factors. The nature of the alleged right involved, the nature of the proceeding, and the possible burden on that proceeding, are all considerations which must be taken into account. * * *."

This Court holds that inasmuch as the requirements of due process frequently vary with the type of proceeding involved, it is, therefore, necessary at the outset to ascertain both the nature and function of the administrative agency involved. *Hannah* v. *Larche, supra,* at p. 1320 (L. Ed. 2d).

b. The West Virginia tax system in general; administrative and judicial review of deficiency assessments affords taxpayers full due process protection under the decisions of this Court.

The respondent, Tax Commissioner, is the chief executive officer of the State Tax Department. He is appointed by the governor by and with the advice and consent of the State Senate, to serve at the will and pleasure of the governor for the term for which the governor was elected and until a successor has been appointed and qualified, and has control and supervision of the State Tax Department and responsibility for the work of each of its divisions. The Tax Commissioner's salary is fixed by statute.

See Code 11-1-1, Code 6-7-2a. The Tax Commissioner has only certain administrative duties relative to the assessment of ad valorem taxes, the assessment and collection whereof being the duties of county assessors and sheriffs. Revenue from ad valorem taxation is dedicated to the county-based free school system, and to city and county governments.

For the reason that only one third of one percent of its total revenue is derived from property taxation, West Virginia is completely dependent, for tax generated revenue, upon a system of excises which it is the statutory responsibility of the Tax Commissioner to administer. These taxes are the Inheritance and Transfer Tax (Code 11-11); the Business Franchise Registration Certificate Tax (Code 11-12); the Annual Tax on Incomes of Certain Carriers (Code 11-12A); the Business and Occupation Tax (Code 11-13); the Gasoline and Special Fuel Excise Tax (Code 11-14); the Motor Carrier Road Tax (Code 11-14A); the Consumers Sales Tax (Code 11-15); the Use Tax (Code 11-15A); the Cigarette Tax (Code 11-17); the Soft Drinks Tax (revenues dedicated to the support of the State's only medical and dental schools) (Code 11-19); the Personal Income Tax (Code 11-21) and the Corporation Net Income Tax (Code 11-24).

In fiscal year 1972-1973 the revenue collected by virtue of the statutes cited above approximated $454,530,955.52 and comprised 37.20% of the total State revenue of $1,221,809,569.05. If funds from federal sources are excluded from the latter figure, these tax measures generated 53.82% of the State's total revenue for fiscal year 1972-1973.

Except for the Inheritance and Transfer Tax, in which case the taxpayer's appeal from a deficiency assessment

is made directly to the circuit court of the county in which the property transferred or the greater portion thereof may be located (Code 11-11-21), and the Personal Income Tax, which affords the taxpayer an opportunity to obtain judicial review of a proposed deficiency in advance of the actual assessment of tax (Code 11-21-82), each of the above cited tax statutes provides for administrative review by the Tax Commissioner of his deficiency assessment of the particular tax involved followed by the judicial appeal from his decision made upon such review.

Although identical language is not employed in every article, each contains sections empowering the Tax Commissioner to make deficiency assessments of the tax levied in the article upon his own investigation indicating taxes due; requiring the service of notice thereof upon the taxpayer, who may respond by filing with the Tax Commissioner a petition or other notice of protest of the assessment. The petition will come on for hearing before the Tax Commissioner, or his designated examiner at which time evidence for and against the assessment may be introduced by the Tax Commissioner and by the taxpayer. Subsequent to the hearing, within a reasonable time, the Tax Commissioner is required to render and serve upon the taxpayer his decision affirming or dismissing the assessment in whole or in part. A taxpayer disagreeing with such decision may appeal it to an appropriate circuit court. Typical of such language is that contained in Code 11-13-7b, the statute challenged in this proceeding, which sets forth the provisions for administrative review of deficiency assessments of the Business and Occupation Tax (Code 11-13). Code 11-13-7b is here quoted in full as follows:

> "The tax commissioner shall give to the taxpayer written notice of any assessment made pur-

suant to this article. Unless the taxpayer to whom a notice of assessment is directed shall, within thirty days after service thereof (except in the case of jeopardy assessments), either personally or by certified mail, file with the tax commissioner a petition in writing, verified under oath by said taxpayer or his duly authorized agent, having knowledge of the facts, setting forth with definiteness and particularity the items of the assessment objected to, together with the reason for such objections, said assessment shall become and be deemed conclusive and the amount thereof shall be payable at the end of the thirty-day period. In every case where a petition for reassessment as above described is filed, the tax commissioner shall assign a time and place for the hearing of same and shall notify the petitioner of such hearing by written notice at least twenty days in advance thereof and such hearing shall be held within sixty days from the filing of the petition for reassessment unless continued by agreement or by the tax commissioner for good cause. The hearing shall be informal and may be conducted by an examiner designated by the tax commissioner. At such hearing evidence may be offered to support the assessment or to prove that it is incorrect. After such hearing the tax commissioner shall, within a reasonable time, give notice in writing of the decision. Unless an appeal is taken within thirty days from service of this notice, the tax commissioner's decision shall be final."

The inherent fairness of this statute, petitioner's assertions to the contrary, is obvious. It will be observed that (1) no action can be taken against a taxpayer's interest without advance notice to him; (2) the taxpayer has the unlimited right to present any defense which he has to the deficiency assessment; (3) the taxpayer is not restricted in the mode of his attack on the deficiency assessment or in his administrative presentation thereof, except

that his petition must assert with definiteness and particularity the items of the deficiency assessment to which he objects, together with the reason for such objections (in practice petitions are frequently amended to provide objections additional to or differing from those first stated); (4) no limitations are placed upon the kind or quantity of the taxpayer's evidence which he may introduce in opposition to the deficiency assessment, whether documentary or presented in the form of oral testimony or otherwise; (5) no limitations are placed upon the taxpayer's right to examine and object to any of the Tax Commissioner's evidence or to examine and cross examine the Tax Commissioner's witnesses; (6) hearings may be continued (in practice, continuances are frequent). See *Jenkins* v. *McKeithen*, 395 U.S. 411, 89 S. Ct. 1843, 23 L. Ed. 2d 404 (1969).

The statutory specification of informal hearings evidences the intent of the West Virginia Legislature that taxpayers be afforded maximum latitude in presenting defenses to deficiency tax assessments and this result has obtained in practice. See *Richardson* v. *Perales*, 402 U.S. 389, 91 S. Ct. 1420, 28 L. Ed. 2d 842 (1971), at p. 352 (L. Ed. 2d). Recordation of hearings is frequent, depending, in the usual instance, upon the multiplicity of issues and evidence.

Petitioner at P. 14 states that the hearing procedure is defective for the reason, among others, that it "must be conducted in haste." It is noteworthy that the deficiency assessment with which the present case is concerned was issued on the 8th day of August, 1967, R. 117; the hearing thereon was held on the 1st day of November, 1967, R. 117; the administrative decision following the hearing was issued on the 5th day of May, 1969, R. 125, a space of almost two years.

The comment should also be made that the Tax Commissioner is not dependent for his remuneration upon the amount of tax which he collects. His salary is taken from the State Treasury and is fixed by statute. See Code 6-7-2a. The salaries of circuit judges are likewise fixed by statute and paid from the State Treasury. See Code 51-2-13.

The matter comes down to the question of the procedure's integrity and fundamental fairness. *Richardson* v. *Perales, supra.* Moreover, these statutes do not, as petitioner maintains, compel the Tax Commissioner to act as an adversary party as well as hearing officer in his administrative review of deficiency tax assessments. The statutes contemplate that the Tax Commissioner function as an adjudicator and fact gatherer, not as an adversary. The Tax Commissioner's efforts in the present case to provide petitioner with procedural due process (discussed in detail *infra*) afford ample evidence that the statutory role as adjudicator in the review proceeding has been accepted.

This Court has, in *Richardson* v. *Perales, supra*, emphatically refused to accept the thesis that there exists an inherent bias, *per se*, on the part of administrators, thereby rendering them naturally favorable to the government's case in deciding contested matters. In that case a claimant attacked the hearing procedure of the Social Security Act on due process grounds, maintaining that since the hearing examiner had the responsibility for gathering the evidence and to make the government's position as strong as possible, he naturally leaned toward a decision in favor of the evidence he has gathered. For this proposition claimant cited *Offutt* v. *United States*, 348 U.S. 11, 75 S. Ct. 11, 99 L. Ed. 11 (1954) and *In re Murchison*, 349 U.S. 133, 75 S. Ct. 623, 99 L. Ed. 942

(1955), two cases relied on by petitioner in the instant proceeding. The Court rejected claimant's due process argument in strong language, pp. 857, 858 (L. Ed.) of the opinion:

> "Neither are we persuaded by the advocate-judge-multiple-hat suggestion. It assumes too much and would bring down too many procedures designed, and working well, for a governmental structure of great and growing complexity. The social security hearing examiner, furthermore, does not act as counsel. He acts as an examiner charged with developing the facts. The 44.2% reversal rate for all federal disability hearings in cases where the state agency does not grant benefits, M. Rock, An Evaluation of the SSA Appeals Process, Report No. 7, U. S. Department of HEW, p 9 (1970), attests to the fairness of the system and refutes the implication of impropriety."

The significance of the language is very clear. This Court will not overthrow a vital administrative review system on the mere imputation of due process violations. Lack of fairness in the actual conduct of the proceeding must be clearly demonstrated.

The principle is firmly established by the decisions of this Court and of the lower federal courts that the combination of investigative and judicial functions within an administrative agency does not, of itself, violate due process of law. Accordingly, the foundation of petitioner's contention that it was denied due process by the procedures contained in the applicable statutes and by the decision of the court below must fall. *Federal Trade Com.* v. *Cement Institute*, 333 U.S. 683, 68 S. Ct. 793, 92 L. Ed. 1010 (1948), at p. 1035; *Kennecott Copper Corporation* v. *F. T. C.*, 467 F.2d 67 (10th Cir. 1972) (U.S. App. pending); *United States* v. *Litton Industries, Inc.*,

462 F.2d 14 (9th Cir. 1972); *Winnick* v. *Manning*, 460 F.2d 545 (2d Cir. 1972); *Intercontinental Indus., Inc.* v. *American Stock Exchange*, 452 F.2d 935 (5th Cir. 1971), *cert. den.*, 409 U.S. 842, 34 L. Ed. 2d 81, 93 S. Ct. 41 (1972); *Ogletree* v. *McNamara*, 449 F.2d 93 (6th Cir. 1971); *Herman* v. *University of South Carolina*, 341 F. Supp. 226 (D. S.C. 1971), *affirmed*, 457 F.2d 902 (4th Cir. 1972); *Tietze* v. *Richardson*, 342 F. Supp. 610 (S.D. Tex. 1972); *Center for Participant Education* v. *Marshall*, 337 F. Supp. 126 (N.D. Fla. 1972).

c. Petitioner failed to exhaust its administrative remedies: petition for writ of certiorari is premature.

From the standpoint of factual development, the controversy between the petitioner and the respondent, Tax Commissioner, remains as it was at the beginning of the review process except that the Tax Commissioner's determination that the manufactured electric power was subject to taxation was affirmed by the court below and his determination that the produced limestone was subject to taxation was rejected by that court.

The petition for writ of certiorari itself demonstrates that review by this Court is premature. The salient feature of the petition is that it contains no allegation that petitioner was denied the right to submit any evidence at the administrative level on the question of value of the manufactured electric power or that the evidence which it did submit was rejected or was not considered by the Tax Commissioner or by the West Virginia Supreme Court of Appeals, or that such evidence was excluded from the administrative record of the proceedings compiled by the Tax Commissioner for submission to the circuit court. The reason that no such allegation is made is that *petitioner introduced no evidence of its own*

respecting the value of the electricity at the administrative hearing or at any time thereafter. Accordingly, petitioner has not exhausted its administrative remedies.

Code 11-13-7 provides that if the Tax Commissioner believes that Business and Occupation Tax has not been sufficiently reported by a taxpayer, he may investigate and determine or estimate the tax liability and make a deficiency assessment therefor. In order that such assessment be made, in this case, an initial determination of the value to be placed on the manufactured electric power was necessary. The administrative review procedures are for the purpose of determining the correctness of the deficiency assessment. A vital aspect of such review in this case was a proper value attributable to the electric power. The Tax Commissioner was thus deprived at the administrative level by the petitioner of any contribution which it could have made toward resolution of this problem. Since the petitioner did not offer evidence of its own at the administrative level on the value of the manufactured electric power, the only evidence in the record on that point was supplied by the Tax Commissioner as the result of his own investigation. See Stipulation R. 51 at 52; R. 135; Exhibit F to Stipulation R. 79 at 88, 89, 90; R. 135. The administrative decision shows that objections to certain factual matters were raised at the administrative level by the petitioner, and were resolved in its favor. Exhibit I to Stipulation R. 117 at 120; R. 135. However, the decision is silent regarding any evidence advanced by petitioner on the value of the electric power. The first submission by petitioner in this area was the unsupported allegation made in its "Notice of Appeal and Appeal from Decision of the State Tax Commissioner Affirming in Part Assessment of Business and Occupation Taxes and Penalties" to the Circuit Court

of Grant County. R. 1 at 5. At the administrative level, petitioner's efforts were almost entirely directed to resolution of the legal questions posed by the deficiency tax assessment, *i.e.* (1) that as a public utility petitioner was not subject to taxation on the manufactured electric power and (2) petitioner was not subject to taxation as a producer of limestone.

The Tax Commissioner took note of the allegation contained in petitioner's "Notice of Appeal and Appeal from Decision of the State Tax Commissioner Affirming in Part Assessment of Business and Occupation Taxes and Penalties" to the Circuit Court that petitioner had not been afforded an opportunity to be heard, administratively, on the Tax Commissioner's evidence (procured from the West Virginia Public Service Commission) on the question of value of the manufactured electric power. R. 1 at 7. Realizing that the original assessment had been issued and the administrative hearing thereon conducted by a predecessor Tax Commissioner, which proceedings had occurred some time prior to the issuance of the administrative decision and that petitioner's allegation might have merit, *the Tax Commissioner fulfilling his statutory role of adjudicator* in reviewing deficiency tax assessments, took the position that the administrative decision had been, through inadvertence on his part, issued prematurely. Accordingly, the Tax Commissioner sought to withdraw the decision from the circuit court in order to conduct a further administrative hearing on the question of value of the manufactured electric power and the value of the produced stone and to permit "the taxpayer *to introduce evidence* (emphasis supplied) and examine the State's evidence" respecting these items. See Defendant's Exhibit A entitled "Notice of Withdrawal of Administrative Decision" R. 15; R. 23 and the

Tax Commissioner's "Plea in Abatement and Motion to Dismiss and Remand" R. 10 at 12; R. 23. The attempt by the Tax Commissioner to withdraw his administrative decision was resisted by petitioner in the circuit court. See plaintiff's "Motion to Strike that Certain Pleading of the Defendant's Entitled 'Plea in Abatement and Motion to Dismiss and Remand' " R. 25; R. 39 wherein the allegation was made that such action on the part of the Tax Commissioner runs "afoul of basic fundamental due process guarantees of the Constitution" R. 27. The circuit court refused to permit remand to the Tax Commissioner for further hearing and asserted its jurisdiction to try the case in full by order dated December 31, 1969 R. 43 as corrected by order of January 5, 1970 R. 47. By order of October 3, 1970, R. 49 the circuit court limited the issues to be tried to: (1) whether petitioner was taxable as a manufacturer of electric power under Code 11-13-2b and (2) whether petitioner was taxable as a producer of stone within the meaning of Code 11-13-2a. All orders were signed by counsel for the parties. Thus, the questions of product values were not submitted to nor decided by the circuit court nor by the West Virginia Supreme Court of Appeals. These matters were specifically left open for further consideration. See Stipulation R. 51 at 57; R. 135.

Code 11-13-8 provides for appeal to the appropriate circuit court from administrative decisions of the Tax Commissioner, rendered after hearing, which hold taxpayers liable for Business and Occupation Taxes imposed by Code 11-13, the Business and Occupation Tax. This statute defines the duty of the circuit courts as follows:

> "The court shall hear the appeal and determine anew all questions submitted to it on appeal from the determination of the tax commissioner."

This language was analyzed in depth by the West Virginia Supreme Court of Appeals in *Walter Butler Building Co.* v. *Soto,* 142 W.Va. 616, 97 S.E.2d 275 (1957), and it was there held that the circuit courts were empowered only to review and determine judicial questions such as the validity of the assessment of tax and the applicability of the taxing statute to the particular taxpayer. The effect of the Court's decision was that, in the judicial review of an administrative proceeding evidence not originally considered by the administrative agency could not, for the first time, be presented to the courts. The rationale of the opinion was founded on Article V, Section 1 of the West Virginia Constitution which requires that the legislative, executive and judicial departments of the State government be separate and distinct, and interdicts the exercise by any one of the three governmental branches of the powers properly belonging to either of the others. Accordingly, the Court has consistently ruled that administrative bodies are part of the executive branch of State government and that their proceedings, including the gathering and consideration of evidence, being functions of the executive branch, the jurisdiction of courts, in reviewing administrative evidentiary rulings, is limited to those matters which were actually considered, or should or should not have been considered by the agency. See in accord: *Hodges* v. *Public Service Commission*, 110 W.Va. 649, 159 S.E. 834 (1931); *Sims* v. *Fisher,* 125 W.Va. 512, 25 S.E.2d 216 (1943); *Danielley* v. *City of Princeton*, 113 W.Va. 252, 167 S.E. 620 (1933). Thus, the West Virginia Supreme Court of Appeals in ruling that the Tax Commissioner must, in the first instance, have the opportunity to examine all of the facts pertinent to the proceeding before him was, in the decision below, following long established

precedent in this jurisdiction. The Court in ruling that the circuit court must (1) decide the case on the evidence in the record as it was received by that court or (2) return the case to the Tax Commissioner for further evidentiary development demonstrated its cognizance of due process requirements in this language found in 200 S.E.2d at page 853:

> "* * * In the instant case justice dictates that the taxpayer be afforded an opportunity to offer its evidence as to values and that the court be empowered, if the circumstances warrant, to remand the case so that this opportunity may be afforded."

Even the petitioner admits P. 15 that "Upon the remand of this case, the Tax Commissioner can and presumably will correct the procedural error occurring upon the first administrative hearing."

Petitioner's quarrel with the respondent, Tax Commissioner, and with the decision of the West Virginia Supreme Court of Appeals is founded on the Court's refusal to permit petitioner to by-pass the Tax Commissioner. The position of the West Virginia Court is that the Tax Commissioner should have, under the applicable statute, the opportunity to pass upon all relevant evidence in matters before him in order that an informed administrative decision can be made for review by the courts; that individuals contesting cases before the Tax Commissioner may not make the decision as to what essential evidence they will offer to the Tax Commissioner and what they may reserve exclusively for consideration in the first instance by the reviewing court. See in accord *Richardson* v. *Perales*, *supra*.

Petitioner insists that due process of law cannot be afforded administratively; that the Federal Constitution

requires that it be permitted to present vital evidence to the reviewing court which was never offered to the Tax Commissioner. It is well settled, however, by the decisions of this Court that the right of appeal or review is not essential provided due process has already been accorded in the tribunal of first instance. Due process of law does not, in all cases, require resort to a court of justice to assert the rights of the public against the individual or to impose burdens on his property for the public use. *Davidson* v. *New Orleans*, 96 U.S. 97, 24 L. Ed. 616 (1878); *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18 How. 272 (Vol. 59 U.S.), 15 L. Ed. 372 (1856); *McMillen* v. *Anderson*, 95 U.S. 37, 24 L. Ed. 335 (1877); *District of Columbia* v. *Clawans*, 300 U.S. 617, 57 S. Ct. 660, 81 L. Ed. 843 (1937); *Baldwin* v. *Iowa State Traveling Men's Assoc.*, 283 U.S. 522, 51 S. Ct. 517, 75 L. Ed. 1244 (1931); *Ohio ex rel. Bryant* v. *Akron Metropolitan Park Dist.*, 281 U.S. 74, 50 S. Ct. 228, 74 L. Ed. 710 (1930); *Luckenbach S.S. Co.* v. *United States*, 272 U.S. 533, 47 S. Ct. 186, 71 L. Ed. 394 (1926); *Lott* v. *Pittman*, 243 U.S. 588, 37 S. Ct. 473, 61 L. Ed. 915 (1917); *Beck* v. *Missouri Valley Drainage Dist.*, 46 F.2d 632 (8th Cir. 1931), *cert. den.*, 284 U.S. 618, 52 S. Ct. 75, 76 L. Ed. 527; *Lindsey* v. *Normet*, 405 U.S. 56, 92 S. Ct. 862, 31 L. Ed. 2d 36 (1972); *Ortwein* v. *Schwab*, ... U.S. ....., 93 S. Ct. ....., 35 L. Ed. 2d 572 (1973).

Full opportunity for procedural due process in the first instance is, and remains, available to the petitioner in this case. Accordingly, the petition for writ of certiorari should be denied.

2.

THE DECISION OF THE SUPREME COURT OF APPEALS OF WEST VIRGINIA IS CLEARLY CORRECT AND NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED.

The Business and Occupation Tax is imposed by Code 11-13-2, which reads in pertinent part as follows:

> "There is hereby levied and shall be collected annual privilege taxes against the persons, on account of the business and other activities, and in the amounts to be determined *by the application of rates against values or gross income* as set forth in sections two-a to two-j [§§ 11-13-2a to 11-13-2j], inclusive, of this article." (Emphasis supplied.)

The provision of the Business and Occupation Tax statute at issue in this case is Code 11-13-2b which prescribes the rate of tax to be paid by persons engaged within the State in the business of manufacturing, compounding or preparing products for sale, profit or commercial use. Code 11-13-2b provides in pertinent part as follows:

> "Upon every person engaging or continuing *within this State in the business of manufacturing*, compounding or preparing for sale, profit, or commercial use, either directly or through the activity of others in whole or part, *any article or articles, substance or substances, commodity or commodities, or electric power not produced by public utilities taxable under other provisions of this article, the amount of the tax to be equal to the value of the article*, substance, commodity *or electric power manufactured*, compounded or prepared for sale, *as shown by the gross proceeds derived from the sale thereof by the manufacturer or person compounding or preparing the same, except as otherwise provided*, multiplied by a rate of four tenths of one per cent. The measure of this tax is the value of the entire product manufactured,

> compounded or prepared in this State for sale, profit or commercial use, regardless of the place of sale or the fact that deliveries may be made to points outside the State. * * *." (Emphasis supplied.)

Code 11-13-2 provides for the computation of value, for purposes of the tax, in instances where goods manufactured in the State are transported from and sold outside West Virginia:

> *"If any person liable for any tax under sections two-a or two-b* [§ 11-13-2a or 11-13-2b] *shall ship or transport his products or any part thereof out of the State without making sale of such products, the value of the products in the condition or form in which they exist immediately before transportation out of the State shall be the basis for the assessment of the tax imposed in said sections,* except in those instances in which another measure of the tax is expressly provided. *The tax commissioner shall prescribe equitable and uniform rules for ascertaining such value."* (Emphasis supplied.)

All sections of Code 11-13 are to be read and considered in pari materia. *Owens-Illinois Glass Company, et al.* v. *Battle, State Tax Commissioner,* 151 W.Va. 655, 154 S.E.2d 854 (1967).

The significant features of the quoted sections as they refer to this case are: (1) the tax is imposed upon persons engaged within the State in the business of manufacturing; (2) the measure of the tax is the value of the entire product within West Virginia; (3) the tax is not imposed upon the sale of anything; (4) reference to proceeds of sale as an indicator of value occurs only when the product is sold within West Virginia; (5) in instances where the product is transported out of West Virginia

for sale in another state value is measured by product worth as it existed immediately prior to such transportation; and (6) the tax does not include sales value at the place of sale outside West Virginia or any value attributable to the product from activities in another state.

The Tax Commissioner recognized that the tax computation was limited by the statute, as well as by the Commerce Clause, Constitution of the United States, Article I, Section 8, to the value of the manufactured electric power within West Virginia and before transmission out of the State. See the Administrative Decision, Exhibit I to Stipulation R. 117 at 123;

> "Ancillary to the legal issue hereinbefore determined is the measure or value of the generated electric power to be used in determining the liability of such manufacturer under Section 2b. In this regard, any proper determination must turn upon the duty placed upon the Tax Commissioner to look to gross proceeds from sales of similar products between buyers and sellers not having a common interest and as controlled by Regulation BOT 6.52, which is applicable *where value is to be determined in the absence of sale within this State.* * * *." (Emphasis supplied.)

The West Virginia value of petitioner's manufactured electric power was obtained, administratively, by the examination of records of sales by Monongahela Power Company, a West Virginia public utility, made to its West Virginia utility customers located in the same general vicinity as petitioner's West Virginia utility customers. See Exhibit F to Stipulation, R. 79 at 88, 90; R. 135. The West Virginia Supreme Court of Appeals, in holding that petitioner should have the opportunity to present evidence as to the West Virginia value of the electric power, at the administrative level also evidenced

its recognition that value was not to be attributed to out of state activities of petitioner.

Many years ago this Court ruled in *Utah Power and Light Company* v. *Pfost*, 286 U.S. 165, 52 S. Ct. 548, 76 L. Ed. 1038 (1932), that a state license tax on the generation of electricity does not, as laid upon electricity transmitted to consumers in another state, impose an unconstitutional burden on interstate commerce. The rationale of the decision was that since commerce does not begin until manufacture is finished, the Commerce Clause of the Federal Constitution does not prevent a state from exercising exclusive control over manufacture. The decision of the West Virginia Supreme Court of Appeals followed *Utah Power and Light Company* v. *Pfost, supra.*

Petitioner engages in West Virginia in the business of a public utility. A small portion of the electric power which it manufactured during the tax years was sold by petitioner to its utility customers within the State. Petitioner was subject to and paid tax on such sales under Code 11-13-2d, which prescribes the tax rate to be paid by persons engaged in the utility business within the State. Petitioner paid no tax whatever on the balance of the manufactured electric power, being approximately 91% of the total production, which it sold outside the State, taking the position that having paid tax under Code 11-13-2d on its West Virginia utility sales, the language contained in Code 11-13-2b "or electric power not produced by public utilities taxable under other provisions of this article" exempted it from payment of any tax under the manufacturing classification set forth in Code 11-13-2b as to that portion of its electric power which was not sold as a utility in West Virginia.

That issue having been decided against it by the decision below, the petitioner now argues P. 19 that because

most of its manufactured electric power is transmitted out of West Virginia and sold in other states, the West Virginia Supreme Court of Appeals has, in effect, imposed a tax upon it merely because the electricity is sold outside the State.

When it is considered that the tax is laid upon the act of manufacturing, not the act of selling (which is a separate business activity taxable under Code 11-13-2c and not applicable to petitioner) the argument presupposes a complete misreading of the applicable statute, the administrative decision and the decision of the West Virginia Court. The decision affords ample assurance that the place of sale of the electric power or its sales price held no significance whatever for the Court.

Accordingly, respondent submits that no substantial federal question is presented by the petition.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari be denied.

Respectfully submitted,

WILLIAM F. CARROLL
Assistant Attorney General
State of West Virginia
Attorney for Respondent

Of Counsel
CHAUNCEY H. BROWNING, JR.
Attorney General
State of West Virginia

SUPREME COURT, U. S.
MAR 21 1974

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1246

VIRGINIA ELECTRIC AND POWER COMPANY,
a corporation,
Petitioner,

v.

CHARLES H. HADEN, II, TAX COMMISSIONER, ETC., REVIVED IN THE NAME OF RICHARD L. DAILEY, Tax Commissioner, etc.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

REPLY BRIEF FOR PETITIONER

H. BRICE GRAVES
JAMES PAUL GEARY
THOMAS N. CHAMBERS
Attorneys for Petitioner

Of Counsel:
HUNTON, WILLIAMS, GAY & GIBSON
P. O. Box 1535
Richmond, Virginia 23212
GEARY AND GEARY
5 Main Street
Petersburg, West Virginia 26847
JACKSON, KELLY, HOLT & O'FARRELL
P. O. Box 553
Charleston, West Virginia 25322

JARRETT PRINTING COMPANY, CHARLESTON, W. VA.

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1246

VIRGINIA ELECTRIC AND POWER COMPANY,
a corporation,
Petitioner,

v.

CHARLES H. HADEN, II, TAX COMMISSIONER, ETC., REVIVED IN THE NAME OF RICHARD L. DAILEY, Tax Commissioner, etc.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

REPLY BRIEF FOR PETITIONER

Petitioner believes that the procedural and substantive tax questions presented in its petition are fairly developed in the petition and brief in opposition. Further argument by petitioner would be inappropriate under the rules of this Court, except for the following brief comment with respect to argument 1c, pages 11-17, of respondent's brief relating to due process of law.

The due process issue is not premature nor does it involve the principal of exhaustion of administrative

remedy. The appeal seeks review of the express holding of the Supreme Court of Appeals of West Virginia that "the circuit court must decide the case on the evidence in the record as it was received or it must return the case to the tax commissioner for the further presentation of evidence on values." The effect of such holding, if allowed to stand, denies to this taxpayer and all other taxpayers involved in State tax controversies due process of law.

The appeal statutes, Code ch. 11, art. 13, sections 7b and 8, require as a condition of the appeal to the Circuit Court that taxpayer first petition the State Tax Commissioner for reassessment of the tax and permits appeal only after the Tax Commissioner enters his administrative decision. The Court below held that the Circuit Court acquired jurisdiction of the case. The administrative prerequisites were satisfied.

Respondent's allegations as to petitioner's failure to present evidence respecting values at the administrative hearing (Brief, pp. 11-13) are outside the record of this case and are incorrect.

As noted in the petition for writ of certiorari, page 9, footnote 4, there is no administrative record in this case. Your petitioner represents, however, that it did in good faith develop its case at the administrative level and did present evidence and arguments as to the value of electric power produced, in part by written statements filed subsequent to the hearing at the request of the taxing authorities. Our complaint in the notice of appeal filed in the Circuit Court (notice of appeal, par. 3(j), R. 6-7) as to the former administrative hearing was that the Tax Commissioner relied upon third party evidence to determine the value of electric power manufactured *which*

evidence was not introduced at the administrative hearing held November 1, 1967. (Emphasis supplied). We stated, however, in our petition filed in this Court, page 15, that the Tax Commissioner can and presumably will correct this procedure upon remand.

Thus, the procedural aspects of the prior administrative hearing are not the issue before this Court. Rather, it is whether the Tax Commissioner's position as adversary prevents him from sitting as the trial judge as to the issue of valuation upon remand. Your petitioner submits that this holding of the Supreme Court of Appeals of West Virginia denies the petitioner due process of law.

Respectfully submitted,

H. BRICE GRAVES
JAMES PAUL GEARY
THOMAS N. CHAMBERS
Attorneys for Petitioner

Of Counsel:

HUNTON, WILLIAMS, GAY & GIBSON
P. O. Box 1535
Richmond, Virginia 23212

GEARY AND GEARY
5 Main Street
Petersburg, West Virginia 26847

JACKSON, KELLY, HOLT & O'FARRELL
P. O. Box 553
Charleston, West Virginia 25322

March, 1974